No. 92-9059

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In The

Supreme Court of the United States

October Term, 1993

JONATHAN DALE SIMMONS,

Petitioner,

v.

SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

JOINT APPENDIX

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CHRONOLOGY OF RELEVANT EVENTS

October 18, 1990:	Petitioner indicted for murder, burglary in the first degree and petit larceny.
June 24, 1991:	Petitioner's trial begins in Richland County Court of General Sessions.
June 27, 1991:	Petitioner convicted as charged.
June 29, 1991:	Beginning of sentencing proceeding before trial jury.
June 30, 1991:	Jury recommends death sentence; petitioner sentenced to death.
February 1, 1993:	Conviction and sentence of death affirmed by Supreme Court of South Carolina, *State v. Simmons*, 427 S.E.2d 175 (S.C. 1993).
March 10, 1993:	Timely petition for rehearing denied without opinion by Supreme Court of South Carolina.
March 26, 1993:	Stay of execution of sentence of death granted by Supreme Court of South Carolina, pending filing and disposition of petition for writ of certiorari in the Supreme Court of the United States.

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

County of Richland

South Carolina

v.

Jonathan Simmons

[Tr. 217] [THE SOLICITOR:]

THE SECOND THING I WOULD ASK IS THAT YOU EXCLUDE ANY MENTION OF PAROLE DURING VOIR DIRE. OBVIOUSLY, WE ARE GOING TO ASK YOU TO EXCLUDE ANY MENTION OF PAROLE THROUGHOUT THIS TRIAL, BUT SPECIFICALLY SINCE WE'RE GETTING READY TO ADDRESS THE JURY IN A VOIR DIRE PROCESS TO EXCLUDE THAT UNDER THE SUPREME COURT'S NEWEST CASE, STATE VERSUS TORRENCE, A LEXINGTON COUNTY CASE.

[Tr. 218] THE COURT: LET THE RECORD SHOW THAT ANDERSON'S NOTEBOOK REPORTS THE CASE AS THE STATE VERSUS MICHAEL R. TORRENCE, T-O-R-R-E-N-C-E, OPINION NUMBER 23403, FILED MAY 20, 1991. AFFIRMED IN PART; REVERSED IN PART AND REMANDED. JUSTICE FINNEY WRITING FOR THE COURT. WHAT SAY YOU, MR. QUINN?

MR. QUINN: YOUR HONOR, THIS MAY TAKE AWHILE TO TALK ABOUT TORRENCE. THE FIRST POINT I WOULD BRING TO THE COURT'S ATTENTION IS, OF COURSE, IF TORRENCE REALLY STANDS FOR THE PROPOSITION THAT THERE SHOULD BE NO PAROLE ELIGIBILITY DISCUSSED, THEN WHY WAS

THE CASE REMANDED WITH INSTRUCTIONS FOR THE JURY TO BE MADE AWARE THAT MR. TORRENCE, IN FACT, DID NOT FACE PAROLE ELIGIBILITY BECAUSE OF –

THE SOLICITOR: YOUR HONOR, FOR PURPOSES OF THE RECORD, FOR JUST THIS PORTION, WE ARE STIPULATING THAT THE DEFENDANT PLED GUILTY LAST WEEK IN LEXINGTON COUNTY TO TWO CRIMES WHICH UNDER THE OMNIBUS CRIME ACT WOULD MAKE HIM ILLEGIBLE [sic] FOR PAROLE. THAT IS THE RELEVANCE OF TORRENCE TO THIS PROCESS. SO, WE ARE STIPULATING TO THAT ONLY FOR THE PURPOSES OF THIS MOTION. IF IT COMES UP IN ANOTHER CONTEXT, WE WILL BE REQUIRING PROOF FROM THE DEFENDANT OF WHAT I HAVE JUST STIPULATED TO.

MR. QUINN: WELL, I MEAN, I'LL ACCEPT THE STIPULATION. IT'S SORT OF SILLY TO STIPULATE TO IT NOW AND [Tr. 219] SAY IT DOESN'T EXIST LATER, BUT I CERTAINLY ACCEPT THE STIPULATION THAT HE DOES HAVE A PRIOR CONVICTION FOR A PRIOR VIOLENT CRIME –

THE SOLICITOR: AND WE MAY STIPULATE TO IT LATER ON. I JUST DON'T WANT TO BIND MYSELF AT THIS POINT.

MR. QUINN: THEREFORE, UNDER SECTION 24-21-640 OF OUR CODE WITH A PRIOR CONVICTION FOR VIOLENT CRIME, HE WOULD NOT BE ELIGIBLE FOR PAROLE ON A CONVICTION FOR A SECOND VIOLENT CRIME WHICH, OF COURSE, IF HE IS CONVICTED IN THIS CASE OF THE MURDER AND/OR

THE BURGLARY WHICH BOTH ARE VIOLENT CRIMES UNDER OUR CODE.

IN TORRENCE, THEY REMANDED THE CASE FOR THE JURY TO BE INSTRUCTED AS FAR AS 24-21-640. SO, MY POSITION FIRST OF ALL IS THAT IT APPEARS TORRENCE MAY STAND FOR THE PROPOSITION THAT YOU ARE NOT SUPPOSED TO TELL JURORS ABOUT PAROLE ELIGIBILITY. THE TWENTY, THIRTY PROBLEM THAT WE RAN INTO WITH ADKINS, BUT THAT LACK OF ELIGIBILITY, THE ABSOLUTE PROHIBITION OF THE LAW AGAINST ELIGIBILITY MAY, IN FACT, BE CHARGED TO THE JURY.

THE COURT: WELL, COUNSEL, WE ARE TALKING ABOUT TWO DIFFERENT THINGS. WE ARE TALKING ABOUT A LEGAL PRINCIPLE IN REGARD TO A JURY CHARGE AND WE ARE TALKING ABOUT QUERY THAT IS POSITED UNDER VOIR DIRE. QUERY THAT IS POSITED UNDER THE AMBIT AND PENUMBRA OF VOIR DIRE DOES NOT STAND IN THE SAME POSITION AS A JURY CHARGE GIVEN BY THE [Tr. 220] COURT TO THE JURY IN REGARD TO PERTINENT RELATIVE ISSUES.

NOW, TORRENCE DOES NOT DEAL WITH VOIR DIRE QUESTIONS RELATING TO PAROLE ELIGIBILITY. THERE'S NOTHING IN THIS CASE THAT RELATES TO THE JURY VOIR DIRE IS THERE, COUNSEL, OR HAVE I MISSED SOMETHING? MY PEEDEE BIFOCALS MAY HAVE JUMPED BUT I FAIL TO SEE A SINGLE LINE OR SENTENCE IN REGARD TO VOIR DIRE. WE DEAL WITH JURY CHARGE APPLICABILITY. AND IT IS IN THAT SETTING THAT I WOULD DEAL WITH THE

MATTER RATHER THAN ON A VOIR DIRE BASIS, IS IT NOT?

MR. QUINN: YES, SIR, EXCEPT THAT MY POSITION WOULD BE THAT IN VOIR DIRE, WE SHOULD ALSO BE ALLOWED TO ASK THE JURORS CONCERNING THEIR BELIEFS ABOUT CAPITAL PUNISHMENT, CERTAINLY THE QUESTIONS THAT YOUR HONOR ASK THEM ABOUT WHETHER THEY ARE JUROR NUMBER ONE, TWO OR THREE AND THAT THEIR POSITION AS TO WHETHER THEY ARE JUROR ONE, TWO OR THREE COULD BE AFFECTED BY WHAT, IN FACT, LIFE IMPRISONMENT MEANS. DOES IT MEAN, IN FACT, AN ABSOLUTE LIFE WHICH IT WOULD IN THIS CASE IF THERE WAS A CONVICTION OF A VIOLENT CRIME OR DOES IT MEAN SOME FUTURE PAROLE ELIGIBILITY.

AND, SO THAT'S WHY I BELIEVE – ALTHOUGH WE'LL ARGUE, IF YOU PREFER, ABOUT THE JURY CHARGE LATER – AT THIS TIME, I THINK, IT WOULD BE PROPER FOR US TO BE ABLE TO ASK THAT QUESTION IN VOIR DIRE. THAT THEY UNDERSTAND THAT [Tr. 221] LIFE IN THIS CASE MEANS A NATURAL LIFE, NO PAROLE AND NO MAX-OUT.

THE COURT: ALL RIGHT. ANY FURTHER ARGUMENT, COUNSEL?

THE SOLICITOR: NO, SIR, YOUR HONOR.

THE COURT: ORDER. THE MATTER BEFORE THE COURT NOW IS AN ISSUE RELATING TO VOIR DIRE EXAMINATION OF PROSPECTIVE JURORS IN

REGARD TO PAROLE ELIGIBILITY. ERUDITE COUNSEL HAVE CITED TO THE COURT STATE VERSUS TORRENCE, OPINION NUMBER 23403. A PERUSAL OF TORRENCE REVEALS A DISCUSSION OF PAROLE ELIGIBILITY IN THE CONTEXT AND WITHIN THE AMBIT OF JURY INSTRUCTIONS. TORRENCE DOES NOT ARTICULATE A RULE IN REGARD TO VOIR DIRE EXAMINATION OF JURORS ON THE ISSUE. CERTAINLY A HORNBOOK OR BLACK LETTER LAW ANALYSIS OF THIS MATTER REVEALS A SEPARATE AND DISTINCT RESPONSE IN REGARD TO JURY CHARGES AS JUXTAPOSED WITH VOIR DIRE EXAMINATION OF LAY PERSONS ON THE ISSUE OF PAROLE ELIGIBILITY. A JURY INSTRUCTION IS GIVEN BY THE COURT TO THE JURY TO GUIDE IN AREAS OF LAW. VOIR DIRE EXAMINATION IS TO ELICIT POSSIBLE BIAS OR PREJUDICE IN REGARD TO A PROSPECTIVE JUROR. THIS COURT NOTES WITH INTEREST THAT TORRENCE IS REPLETE WITH REFERENCES TO STATE VERSUS MATTHEWS, 296 SOUTH CAROLINA 379. STATE VERSUS MATTHEWS IS A LENGTHY DISCUSSION OF PAROLE ELIGIBILITY BUT IT HOLDS THAT A CAPITAL DEFENDANT IS NOT ENTITLED TO PROBE POTENTIAL [Tr. 222] JURORS MISCONCEPTIONS ABOUT THE PAROLE ELIGIBILITY OF A PERSON SENTENCED TO LIFE IMPRISONMENT BY ASKING THEM ON VOIR DIRE WHAT A LIFE SENTENCE MEANT TO THEM. TORRENCE DOES NOT OVERRULE MATTHEWS ON THE VOIR DIRE PROHIBITION.

THIS COURT CONCLUDES THAT TORRENCE WILL BE APPLIED WITH FULL EFFICACY AT THE

APPROPRIATE TIME TOGETHER WITH AND CONCOMITANTLY USING SECTION 24-21-640. BUT THIS COURT WILL NOT ALLOW VOIR DIRE EXAMINATION IN REGARD TO PAROLE ELIGIBILITY.

AND IT IS SO ORDERED.

* * *

[Tr. 1571] THE COURT: THANK YOU. THAT TAKES CARE OF THAT. ALL RIGHT. THE NEXT ISSUE DEALS WITH, OBVIOUSLY, A CONSIDERATION OF TORRENCE.

THE SOLICITOR: I WILL NOT BE AS AMENABLE ON THE TORRENCE ISSUE, HOWEVER, YOUR HONOR.

THE COURT: I WANT THE FOCUS TO BE ON JUSTICE CHANDLER'S CONCURRING OPINION IN THAT REGARD. IT'S OBVIOUSLY STATE LAW.

THE SOLICITOR; FOR PURPOSES OF THE RECORD, YOUR HONOR, IF HE – THE DEFENSE HAS BROUGHT MR. BATSON FROM THE DEPARTMENT OF CORRECTIONS HERE TODAY AND IT MAY BE APPROPRIATE SO THAT WE DON'T – I NOTICE THE SUPREME COURT LATELY HAS BEEN HAVING PROBLEMS WITH STIPULATED FACTS IN SOME INSTANCES, SO, IT MAY BE APPROPRIATE TO PUT HIM ON THE STAND BEFORE WE ACTUALLY DISCUSS WHAT THE CASE MEANS. SO [Tr. 1572] WE HAVE A FACTUAL BASIS.

MR. QUINN: YOUR HONOR, MIGHT I PROCEED THEN?

THE COURT: I –

MR. QUINN: OR DOES YOUR HONOR JUST WISH TO HEAR WHAT THE PROFFERED TESTIMONY WOULD BE?

THE COURT: NO, SIR. I WANT A FULL PROFFER MADE BECAUSE I HAVE SOME OPINION NOW AS TO WHAT THE LAW IS AND I'M NOT GOING TO BE BOUND BY COUNSEL IN THIS CASE IN REGARD TO THIS ISSUE. I HAVE CONSIDERED IT IN GREAT DETAIL. I HAVE WRITTEN ON THIS TOPIC PRIOR TO TORRENCE. MY PUBLICATIONS DON'T RECEIVE THAT WIDE DISSEMINATION BUT IN THE C. L. E. PUBLICATIONS I DO HAVE MATERIALS THAT HAVE BEEN PUBLISHED IN REGARD TO THE DEATH PENALTY AREA AND THIS IS A MATTER OF IMPORT TO THE CIRCUIT BENCH AND I AM GOING TO DEAL WITH THIS IN MY OWN FASHION WITHOUT IT BEING A STIPULATED PRESENTATION BY COUNSEL IN THIS CASE BECAUSE I FEEL UNCOMFORTABLE WITH COUNSEL STIPULATING AS TO WHAT TORRENCE MEANS AND THE EFFICACY OF TORRENCE. THAT DOES NOT NEGATE IN THE SLIGHTEST YOUR FULL RIGHT TO PRESENT A PROFFER AND TO GIVE SPECIFICITY FOR THE RECORD BECAUSE THAT'S MY INTENT TO ALLOW THE MATTER TO BE REVIEWED BY THE STATE SUPREME COURT IN REFERENCE TO THIS CASE.

MR. BRUCK: IN THE INTEREST OF TIME, YOUR HONOR, I DON'T THINK IT WAS MR. QUINN'S SUGGESTION THAT THERE BE ANY LEGAL STIPULATIONS. I THINK HIS SUGGESTION AND PERHAPS [Tr.

1573] WE CAN AGREE ON IT IS THAT THE RECORD AS I UNDERSTAND IT ALREADY REFLECTS THAT MR. SIMMONS WAS ON PREVIOUS OCCASIONS CONVICTED OF SEVERAL OFFENSES WHICH ARE CRIMES OF VIOLENCE WITHIN THE MEANING OF OUR STATUTE. I THINK THE RECORD FURTHERMORE REFLECTS –

THE SOLICITOR: I DON'T KNOW THAT THAT'S ACTUALLY BEEN –

MR. QUINN: IT'S BEEN PROFFERED TO THE COURT BUT WE HAVE NOT SUBMITTED TO THE COURT AS EXHIBITS THE CERTIFIED COPIES.

THE COURT: YOU MAY PROFFER THAT.

THE SOLICITOR: WE HAVE THAT IF YOU DON'T.

MR. QUINN: YOUR HONOR, I WOULD THEN PROFFER TO THE COURT FOR A COURT'S EXHIBIT AN INDICTMENT ENTITLED DOCKET NUMBER 91-GS-32-134 FROM LEXINGTON COUNTY CONCERNING JONATHON DALE SIMMONS WHICH WOULD, ON IT'S FACE AND ON THE SENTENCING SHEET ATTACHED, INDICATE THAT MR. SIMMONS WAS CONVICTED OR PLED GUILTY IN THAT CASE TO CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE AND RECEIVED A SENTENCE OF THIRTY (30) YEARS IN LEXINGTON COUNTY ON JUNE 19, 1991.

I WOULD ALSO SUBMIT TO THE COURT INDICTMENT NUMBER 91-GS-32-135, ALSO FROM LEXINGTON COUNTY AGAINST MR. JONATHAN DALE SIMMONS. THE INDICTMENT IS FOR THREE COUNTS,

THE SENTENCING SHEETS ATTACHED WOULD INDICATE THE CONVICTION ON THE CHARGES OF CRIMINAL SEXUAL CONDUCT IN THE [Tr. 1574] FIRST DEGREE AND BURGLARY IN THE FIRST DEGREE. THOSE CONVICTIONS BY WAY OF GUILTY PLEA AND WOULD INDICATE THAT MR. SIMMONS WAS SENTENCED TO THIRTY (30) YEARS ON THE CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE AND LIFE IMPRISONMENT ON THE BURGLARY.

THE COURT: COURT'S EXHIBIT NUMBERS NINE AND TEN.

WHEREUPON, COURT'S EXHIBIT NUMBERS NINE AND TEN, INDICTMENTS/LEXINGTON COUNTY, MARKED INTO THE RECORD AT THIS TIME.)

THE COURT: THANK YOU.

THE SOLICITOR: YOUR HONOR, THOSE ARE COURT'S EXHIBITS?

THE COURT: THAT'S CORRECT.

MR. QUINN: YOUR HONOR, AT THIS TIME, I WOULD CALL MR. BATSON TO THE STAND.

(LARRY CLEVELAND BATSON, FIRST BEING DULY SWORN, TESTIFIED AS FOLLOWS:)

THE CLERK: PLEASE HAVE A SEAT. STATE YOUR FULL NAME FOR THE RECORD, SPELL YOUR LAST, PLEASE?

THE WITNESS: MY NAME IS LARRY CLEVELAND BATSON, B-A-T-S-O-N.

DIRECT EXAMINATION BY MR. QUINN:

Q MR. BATSON, BY WHOM ARE YOU EMPLOYED?

A SOUTH CAROLINA DEPARTMENT OF CORRECTIONS.

Q AND IN WHAT CAPACITY?

[Tr. 1575] A I'M THE GENERAL COUNSEL TO THE DEPARTMENT OF CORRECTIONS.

Q AND IN THAT CAPACITY, HAVE YOU BECOME FAMILIAR WITH CODE SECTIONS 24-21-640 AND CODE SECTION 16-1-60?

A YES, SIR.

Q ALL RIGHT. AND 24-21-640 DEALING WITH LIFE WITHOUT PAROLE FOR A SECOND CONVICTION OF A VIOLENT CRIME?

A YES, SIR.

Q AND 16-1-60 SETTING OUT WHAT VIOLENT CRIMES –

A WHAT CONSTITUTES VIOLENT CRIMES, YES, SIR.

Q AND IS, IN FACT, CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE AND BURGLARY IN THE FIRST DEGREE, ARE EITHER OR BOTH OF THOSE VIOLENT CRIMES IN SOUTH CAROLINA?

A IT WOULD BE MY POSITION THEY ARE BOTH VIOLENT CRIMES, YES, SIR.

Q AND IS MURDER A VIOLENT CRIME IN SOUTH CAROLINA?

A YES, SIR.

Q IF A PERSON WAS CONVICTED FOR MURDER AT A SEPARATE SENTENCING PROCEEDING AFTER HAVING PREVIOUSLY BEEN CONVICTED OF CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE AND BURGLARY IN THE FIRST DEGREE AND HE RECEIVED A LIFE SENTENCE, CAN HE MAX THAT SENTENCE OUT ACCORDING TO THE DEPARTMENT OF CORRECTIONS' POLICY?

A IS IT THE SAME SERIES OF EVENTS?

Q FOR THE PURPOSES OF THIS RECORD, ASSUME THAT IT WOULD [Tr. 1576] NOT BE THE SAME SERIES OF EVENTS?

A SIR, IT WOULD BE OUR POSITION THAT – THAT AS TO THE SECOND SUBSEQUENT VIOLENT CRIME, THAT WOULD NOT BE – THEY WOULD NOT BE ELIGIBLE FOR PAROLE.

Q AND IF THE SECOND VIOLENT CRIME WAS A MURDER CONVICTION UPON WHICH A LIFE IMPRISONMENT SENTENCE WAS RECEIVED, COULD HE MAX OUT THE LIFE IMPRISONMENT SENTENCE?

A IF – BY MAX OUT, DO YOU MEAN WOULD ANY GOOD TIME OR CREDITS ACCRUE TO THAT SENTENCE?

Q YES, SIR. COULD HE REDUCE THAT SENTENCE IN ANY FASHION?

A NO, SIR, THERE ARE – WE TAKE THE POSITION, THE RECORDS DEPARTMENT – THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS TAKES THE POSITION THAT BEFORE GOOD TIME CREDITS CAN BE APPLIED, THERE MUST BE A DEFINITE SENTENCE AND, OF COURSE, A LIFE SENTENCE IS NOT A DEFINITE TERM.

Q BEG THE COURT'S INDULGENCE. SO, IN SHORT, HE WOULD SERVE A SENTENCE OF LIFE WITHOUT PAROLE WHICH WOULD END UPON HIS DEATH?

A ASSUMING THAT THE SECOND CONVICTION NOT RELATED TO THE FIRST VIOLENT OFFENSE WAS FOR A LIFE TERM, YES, SIR.

Q THAT'S ALL I WOULD HAVE OF THIS WITNESS, YOUR HONOR. CROSS-EXAMINATION HARPOOTLIAN.

Q JUST A COUPLE OF QUESTIONS, MR. BATSON. THIS PERSON WOULDN'T BE ELIGIBLE FOR ANY SORT OF EARLY RELEASE PROGRAM?

[Tr. 1577] A NO, I DIDN'T SAY THAT, SIR. I SAID HE WOULD NOT – I SAID HE WOULD NOT BE ELIGIBLE FOR PAROLE.

Q WOULD THERE BE ANY WAY HE COULD BE RELEASED?

A (NO RESPONSE.)

Q LET ME BE MORE SPECIFIC. COULD HE BE RELEASED UNDER THE PROVISION THAT ALLOWS

THE GOVERNOR TO RELEASE PEOPLE IN A – ON AN EMERGENCY?

A UNDER CERTAIN –

Q TECHNICALLY –

A – TECHNICALLY – TO BE VERY CANDID WITH YOU, SOLICITOR, I WOULD HAVE TO CHECK, I REALLY DON'T KNOW. WE HAVE THE REGULATIONS OF THE DEPARTMENT OF CORRECTIONS THAT WOULD PROHIBIT VIOLENT OFFENDERS BEING RELEASED FROM THOSE PROGRAMS, BUT I'M NOT SURE THAT'S STATUTORY. THAT MAY JUST BE OUR REGULATIONS AND IF THEY ARE, THEY, THEY ARE CERTAINLY SUBJECT TO CHANGE, YES, SIR.

Q THEY ARE YOUR REGULATIONS?

A YES, SIR.

Q WHAT ABOUT FOR FURLOUGH? YOU HAVE PEOPLE SERVING LIFE SENTENCE THAT ARE ON FURLOUGH?

A YES, SIR.

Q DO YOU HAVE PEOPLE WHO ARE ON LIFE SENTENCE THAT ARE ON WORK RELEASE?

A OH, YES, SIR.

Q DO YOU HAVE PEOPLE WHO ARE ON LIFE SENTENCE WHO GO [Tr. 1578] FOR AND I DON'T KNOW WHETHER THEY CALL IT FURLOUGHS OR

NOT, WHO ARE RELEASED BACK INTO THE COMMUNITY FOR SPECIFIC PERIODS OF TIME FOR HOLIDAYS, FOR VACATIONS, HOSE [sic] SORTS OF THINGS?

A YES, SIR.

Q THANK YOU.

REDIRECT EXAMINATION BY MR. QUINN:

Q MR. BATSON, LET ME BE SURE WE ARE CLEAR. WOULD A PERSON SERVING A SENTENCE OF LIFE WITHOUT PAROLE BE ELIGIBLE FOR WORK RELEASE PROGRAMS?

A NO, SIR, NOT UNDER OUR REGULATIONS.

Q ALL RIGHT. THE PEOPLE THAT ARE ELIGIBLE FOR WORK RELEASE PROGRAMS ARE THOSE PERSONS SERVING A LIFE SENTENCE THAT ARE COMING UP FOR PAROLE, ISN'T THAT RIGHT?

A YES, SIR, YOU HAVE TO BE BEFORE YOU ARE PAROLE ELIGIBLE UNDER OUR REGULATIONS, YOU HAVE TO BE WITHIN 24 MONTHS OF SOME RELEASE.

Q SO, WOULD A PERSON SERVING LIFE WITHOUT PAROLE BE ELIGIBLE FOR FURLOUGHS UNDER YOUR REGULATIONS?

A SIR, THERE ARE TYPES – THERE ARE DIFFERENT TYPES OF FURLOUGHS, OKAY. FOR A SUPERVISED FURLOUGH, THEY WOULD NOT. NOW, WE HAVE WHAT WE REFER TO IN THE DEPARTMENT OF CORRECTIONS AS HOLIDAY FURLOUGHS. THEY ARE UNDER THE SAME STATUTORY PROVISION AND

ANY INMATE IN DOUBLE A CUSTODY WOULD BE ELIGIBLE FOR THOSE FURLOUGHS. THEY ARE LIMITED [Tr. 1579] DURATION, 72 HOURS, 48 HOURS AT HOLIDAYS. AND IF THEY MADE THAT CUSTODY GRADE, THEY WOULD BE ELIGIBLE FOR THOSE FURLOUGHS, YES, SIR.

Q HAS ANY INMATE SERVING LIFE WITHOUT PAROLE FOR AN AGGRAVATED MURDER BEEN FURLOUGHED FOR ANY REASON THAT YOU ARE AWARE OF –

A NO, SIR –

Q – INCLUDING THIS HOLIDAY FURLOUGH?

A NO, SIR.

Q THAT'S ALL I HAVE. THANK YOU.

RECROSS-EXAMINATION BY MR. HARPOOTLIAN:

Q JUST A COUPLE OF QUESTIONS. ARE THERE ANY LAWS AGAINST AN INMATE SERVING LIFE WITHOUT PAROLE AND BEING FURLOUGHED?

A NO, SIR, THE [sic] ARE REGULATIONS OF THE DEPARTMENT OF CORRECTIONS.

Q ARE THERE ANY LAWS AGAINST AN INMATE SERVING LIFE WITHOUT PAROLE BEING PUT ON WORK RELEASE?

A NO, SIR.

Q ARE THERE ANY LAWS AGAINST AN INMATE WHO WAS ON LIFE – WHO HAS A LIFE WITHOUT PAROLE SENTENCE FROM RECEIVING A HOLIDAY FURLOUGH?

A THERE ARE NO STATUTORY PROHIBITIONS, NO, SIR.

Q SO, BASICALLY WHAT YOU'RE TELLING ME IS THAT THE CURRENT BOARD OF THE DEPARTMENT OF CORRECTIONS REGULATIONS [Tr. 1580] AND IT'S TOTALLY WITHIN THEIR DISCRETION DOESN'T ALLOW WORK RELEASE FOR PEOPLE WHO ARE ON – SERVING A LIFE WITHOUT PAROLE SENTENCE, IS THAT CORRECT?

A THAT'S CORRECT, SIR.

Q NOW, AND SINCE WE ARE TALKING ABOUT THIS TOPIC, LET ME ASK YOU ABOUT THE NELSON SUIT.

A YES, SIR.

Q UNDER THE NELSON SUIT, YOU HAVE TO KEEP – YOU HAVE TO KEEP NO MORE THAN A CERTAIN NUMBER OF INMATES WITHIN AN INSTITUTION, IS THAT CORRECT? BASICALLY, THAT'S PART OF IT?

A YES, THERE ARE SPACE LIMITATIONS, YES, SIR.

Q SPACE LIMITATIONS. ARE WE CURRENTLY BUILDING PRISONS TO ACCOMMODATE THE NELSON SUIT?

A YES, SIR.

Q WILL WE BE EVER WITHIN THE STANDARDS WE HAVE AGREED TO IN THE NELSON SUIT?

A IT'S MY OPINION THAT THERE IS NOT A CHANCE IN THE WORLD, NO, SIR.

Q ALL RIGHT. SO, AS I UNDERSTAND IT, AT THAT POINT, INMATES WILL BE DISCHARGED, IS THAT CORRECT?

A (NO RESPONSE.)

Q AND IF IT'S TOO SIMPLISTIC OF A QUESTION –

A NO, NO, I UNDERSTAND WHAT YOU ARE SAYING, SOLICITOR. THERE IS ALWAYS THE POTENTIAL THAT SHOULD THE COURT DEEM [Tr. 1581] THAT WE ARE OUT OF COMPLIANCE, THE FEDERAL COURT, THAT THE COURT COULD ORDER A RELEASE, YES, SIR.

Q ALL RIGHT. NOW, LET ME MAKE MORE SPECIFIC. CAN YOU TELL ME, WE HAVE A GENTLEMAN OVER HERE, MR. SIMMONS WHO WAS CONVICTED JUST YESTERDAY OF MURDER, BURGLARY AND LARCENY. IT IS HIS SECOND CONVICTION FOR SUCH. UNDER THE OMNIBUS CRIME BILL HE IS TO SERVE LIFE WITHOUT PAROLE, IS THAT CORRECT?

A YES, SIR.

Q AS A STAFF MEMBER OF THE DEPARTMENT OF CORRECTIONS AND CALLED AS AN EXPERT IN THIS CASE, CAN YOU TELL ME THAT HE WILL NEVER EVER SEE THE LIGHT OF DAY OR THAT HE WILL ALWAYS REMAIN BEHIND BARS? BEHIND BARS?

A NO, SIR, I CAN'T SAY THAT.

Q THANK YOU.

THE COURT: ALL RIGHT. ANYTHING FURTHER?

MR. QUINN: BEG THE COURT'S INDULGENCE. NOTHING FURTHER, YOUR HONOR. THANK YOU.

* * *

[Tr. 1583] MR. QUINN: YOUR HONOR, THE PROFFER I WAS ATTEMPTING TO MAKE THROUGH MR. BUNCH AND APPARENTLY THE SOLICITOR MAY BE WILLING AGREE TO ALL OR PART OF THIS IS THAT MR. CARL LUNDBERG WHO IS COUNSEL FOR THE PAROLE BOARD WHO HAD BEEN SERVED A SUBPOENA BUT IS UNAVAILABLE TODAY TO COME TESTIFY WOULD TESTIFY IF PERMITTED THAT THE PAROLE TAKES THE POSITION THEY WILL NOT CONSIDER FOR PAROLE ANYONE SERVING A SENTENCE OF LIFE WITHOUT PAROLE.

THE SOLICITOR: WE WOULD STIPULATE TO THAT, YOUR HONOR.

THE COURT: LET THAT STIPULATION SHOW FOR THE RECORD. THAT OBVIATES THE NECESSITY OF A LAWYER IN THE CASE TESTIFYING.

THE SOLICITOR: AND I APOLOGIZE TO THE COURT FOR INTERRUPTING.

THE COURT: I APPRECIATE IT. YOU WERE OF ASSISTANCE.

THE SOLICITOR: THANK YOU.

MR. QUINN: YOUR HONOR, THE FINAL MATTER I WOULD PROFFER TO THE COURT IS A COURT EXHIBIT. IT IS AN AFFIDAVIT AND POLL CONDUCTED BY MR. ROBERT OLDENDICK, O-L-D-E-N-D-I-C-K, WHICH CONCERNS AND I WILL OFFER IT TO THE COURT IN JUST A SECOND, YOUR HONOR. OBVIOUSLY YOUR HONOR CAN READ IT FOR HIMSELF. BUT FOR THE PURPOSES OF THE RECORD, IT CONCERNS THE BELIEFS OF THE GENERAL PUBLIC AS TO [Tr. 1584] WHAT POSSIBILITY OF RELEASE IF SENTENCED TO LIFE IMPRISONMENT REALLY MEANS, THE AMOUNT OF TIME SPENT IN PRISON IF SENTENCED TO LIFE IMPRISONMENT AND WHAT THE GENERAL PUBLIC REALLY BELIEVES IT MEANS AND FINALLY, THE IMPORTANCE OF KNOWING THE TIME A PERSON WOULD ACTUALLY HAVE TO SERVE BEFORE THE CHANCE OF RELEASE, WHETHER THAT WOULD ENTER INTO THEIR DELIBERATIONS IN A LIFE IMPRISONMENT OR DEATH PENALTY SITUATION.

THE SOLICITOR: NO OBJECTION.

THE COURT: COURT'S ELEVEN.

(WHEREUPON, COURT'S EXHIBIT NUMBER 11, AFFIDAVIT/OLDENDICK, MARKED INTO THE RECORD AT THIS TIME.)

THE COURT: ALL RIGHT.

MR. QUINN: AND THAT IS THE ORIGINAL.

(WHEREUPON, THE DOCUMENT IS HANDED TO THE COURT AT THIS TIME.)

MR. BRUCK: IF, YOUR HONOR, PLEASE, THAT CONCLUDES THE EVIDENTIARY SHOWING THAT THE DEFENSE WISHES TO MAKE. I DON'T KNOW IF THE STATE HAS ANY EVIDENCE TO PRESENT.

THE SOLICITOR: NO, SIR, WE DON'T.

MR. BRUCK: IF, YOUR HONOR, PLEASE? TO BE CLEAR, IT IS NOT THE DEFENSE INTENTION TO CALL ANY WITNESSES ON THIS POINT. THIS IS SIMPLY – IT'S OUR POSITION AND, I [Tr. 1585] THINK, STATE VERSUS TORRENCE ESTABLISHES BEYOND ANY QUESTION THAT THE INELIGIBILITY OF MR. SIMMONS OR ANY OTHER DEFENDANT IN HIS SITUATION FOR PAROLE IS A MATTER OF LAW TO BE DETERMINED BY THE COURT.

THE STATE SUPREME COURT MADE THAT DETERMINATION BASED SIMPLY ON THE RECORD FACTS OF MR. TORRENCE'S PRIOR MURDER CONVICTION IN THE TORRENCE CASE AND, I THINK, TORRENCE, THEREFORE, HAS TO BE READ FOR THE PROPOSITION THAT THIS IS A LEGAL MATTER WHICH THE COURT MUST DETERMINE AND IF THE MATTER IS ONE THAT IS TO BE CHARGED TO THE JURY, THE COURT SHOULD SIMPLY CHARGE IT AS A MATTER OF LAW.

THE COURT: THAT'S WHAT I'M CONCERNED ABOUT, COUNSEL, IN THIS PARTICULAR MATTER WHAT CHARGE WILL I GIVE TO THE JURY?

MR. BRUCK: VERY WELL. THE REQUEST, YOUR HONOR, IS THAT THE COURT CHARGE THE

PROVISIONS, THE RELEVANT PROVISIONS OF 16 – OF 24-21-640.

THE COURT: 24-21-640.

MR. BRUCK: YES. DOWN TOWARDS THE END OF THAT SECTION WHICH READS AS FOLLOWS: THE BOARD MUST NOT, THAT IS, THE BOARD OF PROBATION, PAROLE AND PARDON MUST NOT GRANT PAROLE NOR IS PAROLE AUTHORIZED TO ANY PRISONER SERVING A SENTENCE FOR A SECOND OR SUBSEQUENT CONVICTION FOLLOWING A SECOND SENTENCING FOR A PRIOR CONVICTION FOR VIOLENT CRIMES AS DEFINED IN SECTION 16-1-60.

[Tr. 1586] WE WOULD FURTHER ASK THE COURT TO CHARGE AS A MATTER OF LAW THAT THE OFFENSES OF FIRST DEGREE BURGLARY AND FIRST DEGREE CRIMINAL SEXUAL CONDUCT ARE VIOLENT CRIMES AS DEFINED IN SECTION 16-1-60. THAT IS REQUEST THAT WE ARE MAKING. IT WOULD, THEREFORE, OF COURSE, BE OPENED TO COUNSEL TO ARGUE AND THERE WOULD BE NO CONTROVERSY BUT THAT MR. SIMMONS WILL NOT BE ELIGIBLE FOR PAROLE REGARDLESS OF THE JURY'S SENTENCING DECISION.

THE COURT: WHAT I WOULD LIKE FOR YOU TO ADDRESS MR. BRUCK IS –

MR. BRUCK: YES, SIR –

THE COURT: – SOMETHING THAT I HAVE IN MY MATERIALS THAT I HAVE HERETOFORE REFERRED TO, CONSIDERED AND IS OF CONCERN

TO THE CIRCUIT BENCH. HISTORICALLY WE KNOW THE DEVELOPMENTAL PROCESS AS IT COMES FORWARD IN THE HANDLING OF THE PAROLE ISSUE BEFORE THE JURY. WE HAD A PROCEDURE IN PLACE AND THEN WE COME AND WE HAVE THESE DECISIONS THAT GIVE US A CHANGE IN THE PROCEDURE. THEN WE HAVE AN ANALYTICAL REVIEW BY JUSTICE CHANDLER INSOFAR AS THESE CASES ARE CONCERNED AND I WOULD LIKE FOR YOU TO ADDRESS DIRECTLY HIS LANGUAGE AS IT RELATES TO THE PROHIBITION, APPARENTLY, THAT HE IS ARTICULATING IN REGARD TO CAPITAL SENTENCING JURORS BEING INFORMED ABOUT PAROLE –

MR. BRUCK: YES, SIR.

THE COURT: THE LANGUAGE IS THERE AND I WOULD [Tr. 1587] LIKE FOR YOU TO ADDRESS THAT LANGUAGE. I CAN ENGAGE IN ACADEMIA EXERCISE WITH YOU, BUT THAT'S WHAT I NEED FOR YOU TO ADDRESS.

MR. BRUCK: IT IS OUR POSITION, YOUR HONOR, THAT THE CONCURRING OPINION OF JUSTICE CHANDLER PROHIBITS ONLY THE CHARGING ON PAROLE AND NOT THE CHARGING ON A DEFENDANT'S INELIGIBILITY FOR PAROLE. WE THINK THAT SOME SUPPORT FOR THIS POSITION IS PROVIDED NOT ONLY BY THE LANGUAGE OF THE OPINION ITSELF WHICH TALKED IN TERMS OF CHARGING ON PAROLE, BUT ADDITIONALLY BY THE VERY FACT THE SUPREME COURT REVERSED MR. TORRENCE'S DEATH SENTENCE AND REMANDED FOR A NEW SENTENCING PROCEEDING

AFTER CHARGING THAT MR. TORRENCE WOULD HAVE BEEN INELIGIBLE FOR PAROLE FOR THIRTY YEARS ON A LIFE SENTENCE. IT COULD HARDLY HAVE BEEN THE INTENTION OF THE SUPREME COURT TO REVERSE HIS DEATH SENTENCE FOLLOWING A PROCEEDING AT WHICH THE JURY WAS GIVEN THAT RELATIVELY FAVORABLE CHARGE, THAT IS, NO PAROLE FOR THIRTY YEARS ONLY TO REQUIRE HIM TO BE SENTENCED BY A JURY THAT WAS TO BE TOLD NOTHING ABOUT HIS PAROLE INELIGIBILITY ON RETRIAL.

IN OTHER WORDS, IF THAT WERE THE INTENTION OF THE COURT, THEY WOULD HAVE BEEN REQUIRING A TRIAL THAT WOULD BE – A RETRIAL THAT WOULD BE LESS ADVANTAGEOUS TO MR. TORRENCE THAN THAT WHICH OCCURRED AT THE FIRST TRIAL AND –

THE COURT: WELL, YOU ARGUE THAT IN TORRENCE, BUT [Tr. 1588] WE CANNOT IGNORE THE FACT THAT PRECEDENTIALLY JUSTICE CHANDLER HAS BEEN DISSENTING IN A NUMBER OF CASES INVOLVING THE APPLICABILITY OF ATKINS AND THE USE OF ATKINS BY THE CIRCUIT BENCH. AND HE HAS COME FORWARD IN A LINE OF CASES IN REGARD TO HIS DISSENT TO THE POINT OF TORRENCE.

MR. BRUCK: NO, MY – NO, I THINK I MAY NOT HAVE MADE MYSELF CLEAR, YOUR HONOR.

MY POINT IS THERE ARE TWO DIFFERENT TYPES OF DEFENDANTS WHO MIGHT –

THE COURT: OH, I UNDERSTAND.

MR. BRUCK: – MIGHT BE ASKING FOR CHARGES ON –

THE COURT: I UNDERSTAND THAT. ELIGIBLE AND INELIGIBLE.

MR. BRUCK: THERE ARE THE THIRTY-YEAR DEFENDANTS AND THE NO PAROLE DEFENDANTS.

I UNDERSTAND STATE VERSUS TORRENCE TO SAY THAT FOR THOSE DEFENDANTS WHO ARE ELIGIBLE FOR PAROLE, THE SUBJECT OF PAROLE SHOULD NOT BE RAISED, HOWEVER, THERE IS THE SECOND CATEGORY WHICH IT SO HAPPENS WAS MR. TORRENCE'S OWN SITUATION WHO ARE COMPLETELY INELIGIBLE FOR PAROLE. THAT IS ALSO MR. SIMMONS' SITUATION.

AS TO THOSE DEFENDANTS, I HAVE READ TORRENCE IN VAIN TO FIND ANY INDICATION THAT THE COURT DOES NOT WISH THE TRUTH TO BE TOLD TO THE JURY ABOUT THE INELIGIBILITY OF SUCH DEFENDANTS.

[Tr. 1589] NOW, I WILL ADMIT THIS IS FIRST CASE I HAVE EVER SEEN, AT LEAST IN RECENT YEARS IN WHICH A DECISION OF THE COURT IS HANDED DOWN IN A CONCURRING OPINION AND I WILL ADMIT THAT IT IS NOT CRYSTAL CLEAR AND PRECISELY FOR THAT REASON, I HAVE FILED WITH THE SUPREME COURT A PETITION, A MOTION FOR CLARIFICATION OR IN THE ALTERNATIVE FOR A REHEARING WHICH IS STILL PENDING WHICH BRINGS ME

TO ANOTHER POINT WHICH IS THAT TORRENCE IS NOT FINAL.

THE COURT: YOU ARGUED SOME CASES I CAN'T REMEMBER THEM ALL, COLORADO, ARIZONA.

MR BRUCK: HAS, YOUR HONOR, SEEN THE REHEARING?

THE COURT: I WAS –

MR. BRUCK: YES, THE – THE – AS IT HAPPENS, I SHOULD ADD THAT THE DECISION OF THE SUPREME COURT ON THIS POINT IN TORRENCE CAME, WITH ALL DUE RESPECT, OUT OF THE BLUE. IT WAS NOT REQUESTED BY THE STATE. IT WAS NOT BRIEFED. IT WAS NOT ARGUED. AND, IN FACT, ONE OF THE TWO STATE CASES UPON WHICH THE STATE SUPREME COURT RELIED, NEW MEXICO CASE HAS SINCE BEEN OVERRULED BY THE SUPREME COURT OF NEW MEXICO. SO, THE LAW IS IN CONSIDERABLE FLUX. I HAVE DONE MY RESEARCH SINCE TORRENCE CAME DOWN AND HAVE NOT FOUND A SINGLE STATE IN THE UNION THAT HAS LIFE WITHOUT PAROLE AND YET REFUSES TO TELL THE JURY THAT THE DEFENDANT WILL BE INELIGIBLE FOR PAROLE. IN FACT, MOST STATES THAT HAVE LIFE WITHOUT PAROLE ACTUALLY MAKE THAT FACT PART OF [Tr. 1590] THE VERDICT. THE JURY IS INVITED TO CHOOSE BETWEEN DEATH OR LIFE WITHOUT THE POSSIBILITY OF PAROLE. THAT'S THE SITUATION IN CALIFORNIA AND IN A NUMBER OF OTHER LARGE STATES.

SO, WE – I THINK FOR THE REASONS I'VE TOLD YOU, I DON'T THINK TORRENCE DID WHAT THE STATE PRESUMABLY THINKS THEY DID. I DON'T THINK TORRENCE IS ABOUT PEOPLE IN THIS SITUATION. IF IT WAS, I DON'T THINK THEY WOULD HAVE ORDERED A NEW SENTENCING TRIAL. BUT, FURTHERMORE, ANY AMBIGUITY ON THIS POINT AND TO GIVE THE STATE THEIR DUE, I'LL CONCEDE THAT THERE MAY BE SOME AMBIGUITY. IF THERE WASN'T, I WOULDN'T HAVE ASKED THE SUPREME COURT FOR CLARIFICATION. ANY AMBIGUITY OUGHT TO BE RESOLVED WITH DUE REGARD FOR THE FACT THAT IF THE STATE IS RIGHT, SOUTH CAROLINA WILL BE SETTING FORTH ON UNCHARTED CONSTITUTIONAL WATERS KEEPING THE JURY IN THE DARK ON A POINT WHICH EVERY OTHER STATE THAT I'VE BEEN ABLE TO FIND THAT HAS A SIMILAR LAW LET'S THE JURY KNOW ABOUT AND THERE IS VERY LITTLE DOUBT IN MY MIND THAT THIS CASE, THAT THIS ISSUE, WILL BECOME THE NEXT SKIPPER VERSUS SOUTH CAROLINA FOR ALMOST EXACTLY THE RATIONALE THAT MOTIVATED THE UNITED STATES SUPREME COURT TO REVERSE THE RULE THAT HAD PERTAINED IN SOUTH CAROLINA IN SKIPPER. THAT IS TO SAY, THE FUTURE GOOD BEHAVIOR OF THE DEFENDANT IN PRISON AS A MITIGATING FACTOR. THE – I HAPPEN TO BE AS YOUR HONOR MAY KNOW, THE LAWYER [Tr. 1591] WHO ARGUED THE SKIPPER CASE IN THE UNITED STATES SUPREME COURT, SO, I'M FAIRLY FAMILIAR WITH THE ARGUMENTS THAT THE SUPREME COURT FOUND TO BE CONVINCING AND

ESSENTIALLY, I THINK, A READING OF THE SKIPPER CASE SHOWS THAT THE UNITED STATES SUPREME COURT WHICH HAD LONG HELD THAT THE FUTURE DANGEROUSNESS OF A DEFENDANT IS RELEVANT IN A CAPITAL SENTENCING.

BY THE SAME TOKEN, THE FUTURE NON-DANGEROUSNESS OF A CAPITAL DEFENDANT MUST ALSO BE PERMITTED TO BE CONSIDERED AND, INDEED, THE MORE THAT THE STATE PURPORTS TO SHOW THAT THE DEFENDANT WOULD BE DANGEROUS IN THE FUTURE, THE MORE CRUCIAL IT IS THAT THE JURY HAVE ALL THE RELEVANT INFORMATION TO DETERMINE WHETHER OR NOT THE DEFENDANT, IN FACT, MAY NOT BE ALL THAT DANGEROUS.

NOW, IF THE FACT THAT THE DEFENDANT IS LIKELY TO BE A WELL-BEHAVED PRISON INMATE, IT'S CONSTITUTIONALLY INDISPENSABLE AND SKIPPER SAYS IT IS, THAT HOW MUCH MORE IMPORTANT IS IT THAT THE DEFENDANT WILL REMAIN A PRISON INMATE AND WILL NOT BE ELIGIBLE FOR PAROLE.

NOW, I RECOGNIZE THAT ABSENT AN INSTRUCTION, NOTHING WOULD EVER BE SAID ABOUT PAROLE. HOWEVER, I THINK WE MUST ALSO ACKNOWLEDGE THAT PAROLE IS A MATTER OF COMMON KNOWLEDGE. THAT IS WHAT MOTIVATED THE – THAT RECOGNITION, REGARDLESS OF WHAT YOU DO WITH IT, THAT FACTUAL RECOGNITION MOTIVATED THE SUPREME COURT IN ATKINS IS UNDENIABLE. I [Tr. 1592] THINK ANYONE – ANY

ADULT IS AWARE OF THE EXISTENCE OF SUCH A THING AS PAROLE AND ANYONE WHO REMEMBERS THE WILLIE HORTON CAMPAIGN OF 1988 KNOWS THAT THIS IS MATTER OF GREAT PUBLIC CONTROVERSY AND CONCERN. BUT WE DIDN'T WANT TO REST ON WHAT WE THINK THE PUBLIC KNOWS OR THE PEOPLE IN THE JURY BOX KNOW OR WHAT WE THINK EVERYONE KNOWS THE PUBLIC KNOWS AND FOR THIS REASON, WE COMMISSIONED THE POLL BY DR. OLDENDICK WHICH YOUR HONOR NOW HAS BEFORE YOU WITHOUT OBJECTION. AND THIS POLL, INDEED, IT IS A STATEWIDE POLL MADE BY A PROFESSIONAL POLLING ORGANIZATION. THE WAY THE POLL WAS CONDUCTED IS SET FORTH IN THE DOCUMENT. THE POLL DID NOT SIMPLY POLL ALL RESIDENTS OF SOUTH CAROLINA BUT REQUIRED THAT THE PERSON POLLED HAVE – BE, AS NEAR AS COULD BE DETERMINED, BE ELIGIBLE FOR JURY DUTY IN THAT THEY WERE REQUIRED TO SAY THEY WERE EITHER REGISTERED VOTERS OR HAD VALID SOUTH CAROLINA DRIVERS LICENSE. THEY WERE THEN IN A VERY SIMPLE PRELIMINARY WAY DEATH QUALIFIED AND LIFE QUALIFIED. THE RESPONDENTS IN THE POLL WERE ASKED WHETHER THEY WOULD ALWAYS VOTE FOR THE DEATH PENALTY – I'M PARAPHRASING – YOUR HONOR HAS THE EXACT WORDING BEFORE YOU – IN ALL CASES OF MURDER OR WHETHER THEY WOULD NEVER VOTE FOR IT AND, OUT OF AN ABUNDANCE OF CAUTION, THE RESULTS WERE TABULATED BOTH FOR ALL JURY ELIGIBLE RESPONDENTS AND ALSO FOR ONLY THOSE WHO SAID

THAT THEY WOULD NEITHER, ALWAYS NOR NEVER VOTE FOR THE DEATH PENALTY, BUT THOSE WHO [Tr. 1593] WOULD SUPPORT THE DEATH PENALTY DEPENDING ON THE CIRCUMSTANCES OF EACH INDIVIDUAL CASE WHICH IS ROUGH MEASURE. I REALIZE THAT THERE ARE FINE SHADES THAT WE CAN ARGUE ABOUT, BUT AS A ROUGH MEASURE, I THINK, THAT IS AN ACCURATE DESCRIPTION OF THE SORTS OF SOUTH CAROLINIANS WHO SIT OR WHO ARE ELIGIBLE TO SIT ON CAPITAL INJURIES – JURIES.

THE INITIAL RESPONSE TO THE MATERIAL QUESTIONS THAT WERE PUT TO THIS SAMPLE OF 504 WHICH IS STATISTICALLY A VERY LARGE SAMPLE, 504 SOUTH CAROLINIAN DEATH QUALIFIED OR DEATH PENALTY JURY ELIGIBLE RESPONDENTS WAS WHETHER A PERSON WHO IS CONVICTED FOR MURDER IN SOUTH CAROLINA – IF A PERSON IS SENTENCED TO LIFE, DOES THIS MEAN THEY WILL HAVE TO SPEND THE REST OF LIFE IN PRISON OR CAN THEY BE RELEASED FROM PRISON AT SOME POINT IN THE FUTURE. THE RESPONSE WAS THAT THEY WOULD – TWENTY PERCENT SAID THAT THEY WOULD HAVE TO SPENT [sic] THE REST OF THEIR LIFE AND 71.6 PERCENT SAID THAT THEY CAN BE RELEASED AT SOME POINT.

THE NEXT QUESTION WAS IF YOU HEARD THAT SOMEONE WAS SENTENCED BY A COURT IN SOUTH CAROLINA TO LIFE IMPRISONMENT FOR COMMITTING A MURDER, ABOUT HOW MUCH TIME DO YOU THINK THEY WOULD HAVE TO SPEND IN PRISON?

THIS WAS AND – THIS – THEY WERE THEN PERMITTED TO ANSWER ANY NUMBER OF YEARS. AND AS YOUR HONOR WILL NOTICE FROM TABLE TWO, THE RESPONSES ARE ALL OVER THE LOT FROM ONE YEAR TO [Tr. 1594] 80. INTERESTINGLY, ALTHOUGH, TWENTY PERCENT INITIALLY SAID THAT THEY WOULD HAVE TO SPEND THEIR WHOLE LIFE, WHEN ASKED THE SECOND QUESTION, ONLY 7 PERCENT SAID THE REST OF THEIR LIFE AND THE REST OF THE OTHER – A THIRD SAID THEY DIDN'T KNOW AND THEN YOU SEE THE PERCENTAGES. SIX PERCENT, THE FIRST LARGE NUMBER THOUGHT IT WOULD BE TEN YEARS; 14.2 PERCENT TWENTY. AND WHEN THEY ARE BROKEN DOWN INTO CATEGORIES, 15.6 PERCENT EXPECTED THAT IT WOULD BE LESS THAN TEN YEARS; 32 PERCENT THOUGHT 10 TO 19 YEARS; 24.7, 20 TO 29 YEARS AND ONLY 14.9 SAID THIRTY OR MORE.

NOW, WE ARE DEALING HERE WITH A PERSON WHO, IN FACT, WILL NEVER BE ELIGIBLE FOR RELEASE. ONLY 7.1 PERCENT WHICH IS ALMOST A INSIGNIFICANT NUMBER OF THIS VERY LARGE SAMPLE OF JURY ELIGIBLE PEOPLE GUESSED THAT THAT IS THE SITUATION.

THEN THE LAST QUESTION THAT WAS ASKED WAS WHETHER – WAS WHETHER THEY THOUGHT IT WAS EXTREMELY – WELL, I'LL READ THE QUESTION INTO THE RECORD. AS YOU MAY KNOW IN SOUTH CAROLINA, THE JURY NORMALLY DECIDES WHETHER TO SENTENCE A CONVICTED MURDERER TO LIFE IMPRISONMENT OR THE DEATH PENALTY. IF YOU WERE ON A JURY AND HAD TO MAKE THAT

DECISION, HOW IMPORTANT WOULD IT BE FOR YOU TO KNOW HOW MUCH THE PERSON WOULD HAVE TO SPEND IN PRISON BEFORE THEY WOULD HAVE A CHANCE TO BE RELEASED IF YOU SENTENCED THEM TO LIFE IMPRISONMENT? EXTREMELY IMPORTANT, VERY IMPORTANT, [Tr. 1595] SOMEWHAT IMPORTANT, NOT TOO IMPORTANT OR NOT AT ALL IMPORTANT. AND HERE, I THINK, WE HAVE THE CONFIRMATION IN EXACTLY WHAT I TOLD YOU BEFORE ABOUT SKIPPER VERSUS SOUTH CAROLINA. 43 PERCENT SAID EXTREMELY IMPORTANT AND ANOTHER 33.5 PERCENT SAID VERY IMPORTANT FOR A TOTAL OF MORE THAN THREE QUARTERS. WE THINK IT WOULD BE EXTREMELY OR VERY IMPORTANT TO KNOW WHEN THE DEFENDANT WOULD BE RELEASED.

SO YOU HAVE A SITUATION IN WHICH JURIES OR AT LEAST CITIZENS OF SOUTH CAROLINA, FIRST OFF THINK ERRONEOUSLY IN THIS CASE. INDEED, ERRONEOUSLY WRONG IN ALL CASES THAT DEFENDANTS CAN BE RELEASED AFTER RELATIVELY SHORT PERIODS OF TIME AND THE LARGE MAJORITY OF WHOM THINK IT IS EXTREMELY IMPORTANT OR VERY IMPORTANT TO KNOW HOW SOON SOMEBODY CAN BE RELEASED. IT WOULD REQUIRE A VERY, VERY GOOD REASON TO JUSTIFY KEEPING THE JURY IN THE DARK WHEN THE ANSWER IS PRINTED IN THE CODE IN BLACK AND WHITE. THE CORRECT ANSWER IS THAT MR. SIMMONS MAY NEVER BE RELEASED FROM HIS SENTENCE OF LIFE IMPRISONMENT IF HE IS SENTENCED – IF HIS LIFE IS SPARED.

THE COURT: IS IT MAY NEVER AS YOU'VE JUST USED THE PHRASE OR IS IT INELIGIBLE FOR PAROLE?

MR. BRUCK: INELIGIBLE FOR PAROLE. NOW, I AM NOT CONCERN [sic] ABOUT THE VERBIAGE. IF THE COURT FELT IT WAS MORE APPROPRIATE TO CHARGE THE JURY THAT HE IS – HE WILL BE INELIGIBLE FOR PAROLE FOR HIS ENTIRE LIFETIME OR WHATEVER [Tr. 1596] THE LANGUAGE THAT THE COURT THINKS IS MOST APPROPRIATE, THAT WOULD BE FINE WITH US. IT IS NOT THE LANGUAGE OF THE STATUTE BUT THE EFFECT OF THE STATUTE THAT WE THINK THIS JURY NEEDS TO KNOW. THE EVIDENCE BEFORE THIS JURY IS THAT MR. SIMMONS HAS COMMITTED THIS AGGRAVATED MURDER AND HAS ALSO COMMITTED THE CRIMES ABOUT WHICH THEY HAVE ALREADY HEARD INVOLVING OTHER ELDERLY LADIES. THE STATE IS ARGUING THAT HE SHOULD BE SENTENCED TO DEATH. THE QUESTION WILL AS SURELY AS WE ARE HERE IN THIS COURTROOM TODAY, THE QUESTION WILL ARISE IN THE JURY ROOM IF WE DON'T SENTENCE HIM TO DEATH, WHAT THEN. EVERYONE IN THIS ROOM KNOWS THE ANSWER, BUT WE ARE NOT THE ONES DOING THE SENTENCING. THE PEOPLE THAT NEED TO KNOW THE ANSWER ARE THE ONES WHO HAVE THE RESPONSIBILITY TO SENTENCE.

I WOULD SUBMIT TO YOU THAT IF YOUR HONOR DOES NOT TELL THE JURY WHAT THE ANSWER TO THAT QUESTION IS, THEY WILL PROVIDE THE ANSWER FOR THEMSELVES. NOW, IT IS POSSIBLE, IT HAPPENS IN MAYBE HALF THE CASES

THAT THE JURY WILL COME OUT AND ASK YOU FOR FURTHER GUIDANCE AND, IF SO, SURELY THE COURT WOULD THEN, I WOULD HOPE, CHARGE THEM THAT MR. SIMMONS COULD NOT BE CONSIDERED FOR PAROLE UNDER THE STATUE. BUT THE REAL DANGER IS THAT THEY WILL DECIDE THAT QUESTION ON THEIR OWN BASED ON WHAT THEY HAVE SEEN ON T.V., BASED ON WHAT –

THE COURT: WELL, MR. BRUCK, YOU ARE CONTINUING [Tr. 1597] TO ARGUE IN REGARD TO A POLL. I AM MORE CONCERNED WITH THE EFFICACY OF THE LANGUAGE USED BY JUSTICE CHANDLER. I AM BOUND BY JUSTICE CHANDLER'S OPINION NOW. IF IT DOES NOT MEAN ANYTHING IN THIS CASE, THAT'S ONE THING OR IF IT'S NOT APPOSITE OR INAPPOSITE –

MR. BRUCK: YES, SIR –

THE COURT: – THAT'S ANOTHER THING.

THE SOLICITOR: YOUR HONOR, MIGHT I ASK ONE QUESTION AND MAYBE MR. BRUCK – I'VE BEEN WILLING TO CONCEDE ONE ISSUE THIS AFTERNOON, I MIGHT BE WILLING TO CONCEDE ANOTHER IF HE COULD EXPLAIN TO ME WHY JUSTICE CHANDLER ON PAGE 27 OF THIS OPINION SAYS IN CONCLUSION FOR ALL OF THE STATED REASONS, I WOULD OVERRULE ATKINS TO THE EXTENT THAT IT PERMITS THE INTRODUCTION OF PAROLE IN A CAPITAL SENTENCING DECISION. CONCURRED WITH BY GREGORY, HARWELL AND TOAL.

MR. BRUCK: THE – I WILL RESPOND TO THAT. AND IT'S THE SAME RESPONSE THAT I HAVE ALREADY MADE. WE ARE NOT INTRODUCING PAROLE. WE ARE INTRODUCING THE UNAVAILABILITY OF PAROLE AND THERE IS VERY BIG DIFFERENCE. IF THIS – IF THIS WERE A CASE LIKE ATKINS AND WE WERE ASKING FOR A CHARGE OF – WELL, NO – IF THIS WERE A CASE LIKE MANY AND WE WERE ASKING FOR THE JURY TO BE CHARGED THAT MR. SIMMONS WOULD BE INELIGIBLE FOR PAROLE FOR A PERIOD OF THIRTY YEARS, THEN I WOULD NOT BE ABLE TO RESPOND [Tr. 1598] TO THAT. THE STATE LAW WHEN IT BECOMES FINAL, AS IT IS NOT NOW IN TORRENCE, WOULD SUSTAIN THE SOLICITOR'S POSITION.

THE SOLICITOR: MIGHT I ASK ONE OTHER QUESTION? THEN YOUR POSITION IS IF WE WERE DEALING WITH SOMEONE WHO DID NOT HAVE A PRIOR CONVICTION FOR A VIOLENT CRIME IS THAT THE JURY SHOULD BE A TOLD HE'S ELIGIBLE FOR PAROLE IN THIRTY YEARS?

MR. BRUCK: UNDER TORRENCE, MY POSITION WOULD BE THAT I AM BOUND OR AT LEAST WHEN TORRENCE BECOMES FINAL, IF IT DOES, THAT I WOULD BE BOUND BY TORRENCE. WE SUBMIT THAT THAT IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT AND WHICH THE RECORD SO REFLECT BUT I COULD NOT BE ABLE TO ARGUE TO A CIRCUIT JUDGE THAT THAT INSTRUCTION SHOULD BE GIVEN IN THE LIGHT OF TORRENCE WERE IT FOUND.

THE SOLICITOR: WELL, I'M JUST TRYING TO FIND A CONSISTENCY HERE. WE'RE GOING TO TELL JURIES WHERE THERE IS NO PRIOR CONVICTION THAT IT'S A TWENTY-YEAR ELIGIBILITY IF YOU DON'T FIND AN AGGRAVATING CIRCUMSTANCE; A THIRTY-YEAR ELIGIBILITY IF YOU FIND AN AGGRAVATING CIRCUMSTANCE OR IN THIS CASE NONE OR IS IT JUST WHERE WE HAVE DEFENDANTS THAT AREN'T ELIGIBLE. IS IT YOUR POSITION THAT UNDER TORRENCE THAT JUSTICE CHANDLER'S OPINION WOULD BE INAPPROPRIATE? AND THAT, I GUESS, IS THE DILEMMA HERE.

MR. BRUCK: OH, OH. ALL RIGHT. MY POSITION WOULD BE, FOR ANYBODY WHO IS INTERESTED, IS THAT THE [Tr. 1599] EXCLUSION OF PAROLE INELIGIBILITY UNDER ANY CIRCUMSTANCES VIOLATES THE EIGHTH AMENDMENT. HOWEVER, WITH RESPECT TO THE FIRST CATEGORY, THE PEOPLE THAT ARE ELIGIBLE AFTER TWENTY OR THIRTY YEARS, THAT ARGUMENT IS, FOR NOW, FORECLOSED BY TORRENCE. HOWEVER –

THE SOLICITOR: WELL, LET ME ASK YOU THIS AND YOU MADE AN ARGUMENT JUST A MOMENT AGO THAT WE OUGHT TO ALLOW JURORS TO KNOW ABOUT THIS BECAUSE THEY ARE GOING TO TALK ABOUT IT ANYWAY. ONE OF THE CARDINAL PRINCIPLES OF THE CONSTITUTION IS THAT NO ONE SHOULD HAVE TO TESTIFY AGAINST THEMSELVES. THE JUDGE YESTERDAY TOLD THE JURY THEY SHOULDN'T CONSIDER IN ANY WAY THE FACT THAT THE DEFENDANT DIDN'T TAKE THE STAND. WOULDN'T IT BE – MAKE MORE SENSE TO

HAVE THE JUDGE TELL THE JURY PAROLE OR THE POSSIBILITY THEREOF IS NONE OF YOUR CONCERN. A PROPHYLACTIC CHARGE SUCH AS THAT WOULD ELIMINATE THIS ENTIRE ISSUE FROM THE JURY'S MINDS AND CERTAINLY IF THE SUPREME COURT HAS UPHELD THAT PROPHYLACTIC CHARGE TO ELIMINATE – WE ALL KNOW IF YOU DID A POLL ON PEOPLE'S OPINIONS ON DEFENDANTS THAT DON'T TAKE THE STAND, I THINK, 75 PERCENT OF THEM WOULD SAY IT'S BECAUSE THEY ARE HIDING SOMETHING, BECAUSE THEY HAVE A RECORD, BECAUSE THERE'S SOME REASON FOR THEM NOT TO TESTIFY.

YOUR HONOR, I GUESS, I'M PERHAPS DEALING OR ENGAGING IN ACADEMIC DEBATE WITH MR. BRUCK AND THAT'S NOT [Tr. 1600] THE ISSUE. I THINK THAT WE OUGHT TO STICK TO – I UNDERSTAND HE'S FILED A PETITION FOR REHEARING. WE BELIEVE STATE VERSUS TORRENCE IS THE LAW. WE BELIEVE JUSTICE CHANDLER'S OPINION IS THE LAW. HIS OPINION IS THAT ATKINS IS OVERRULED TO THE EXTENT THAT IT PERMITS INTRODUCTION OF PAROLE INTO THE CAPITAL SENTENCING PROCESS. THREE OTHER JUSTICES HAVE AGREED WITH HIM. WE'D ASK YOU TO NOT ALLOW THE ARGUMENT, ANY ARGUMENT BY STATE OR DEFENSE ABOUT PAROLE AND NOT CHARGE THE JURY ON ANYTHING CONCERNING PAROLE. THAT'S OUR POSITION. WE WOULD ASK YOU TO GO AHEAD AND RULE ON THAT. WE ONLY HAVE A FEW MORE HOURS BEFORE WE HAVE TO START THE RE-SENTENCING PROCESS. AND MR. BRUCK IS VERY ARTICULATE. HE'S BEEN IN FRONT OF THE SUPREME

COURTS. HE ARGUES DAILY IN FRONT OF THE HIGHEST BENCHES IN THIS – OF JUDGES IN THIS COUNTRY AND I'M SURE HE IS ARTICULATE AND REASONED WELL BEYOND MY MEANS, HOWEVER –

THE COURT: PUNDITIC.

THE SOLICITOR: PUNDITIC. HOWEVER, WE – I JUST – AND HIS POLL IS INTERESTING AND I HAVEN'T OBJECTED TO IT, BUT, AGAIN, I WOULD ASK THAT WE GET BACK TO THE POINT. WHAT IS THERE TO INDICATE AND WE CAN DEBATE WHETHER THE GLASS IS HALF FULL OR HALF EMPTY ALL DAY LONG. THIS IS – THAT'S NOT THE ISSUE. I SUGGEST WE GET ON WITH THE MATTER. WE HAVE SOME EVIDENTIARY MATTERS WE WANT TO TALK ABOUT HERE IN JUST A MOMENT, YOUR HONOR.

[Tr. 1601] THE COURT: ALL RIGHT.

MR. BRUCK: I'VE EXPLAINED AS BEST I CAN WHY I DON'T THINK TORRENCE CONTROLS. IN VIEW OF THAT, I THINK, WE ARE BOUND BY THE CONSTITUTIONAL PRECEPT AND I QUOTE FROM MCCLUSKEY VERSUS KEMP THAT "STATES CANNOT LIMIT THE SENTENCERS CONSIDERATION OF ANY RELEVANT CIRCUMSTANCE THAT COULD CAUSE IT TO DECLINE TO IMPOSE THE DEATH PENALTY". I'M ACTUALLY QUOTING FROM JUSTICE REHNQUIST'S OPINION IN PAYNE VERSUS TENNESSEE WHEN HE QUOTES THE MACLOSITY DECISION ON THAT POINT. THAT IS A PRINCIPLE OF EIGHTH AMENDMENT LAW AND BETTER ESTABLISHED THAN ANY OTHER IN THE AREA OF THE DEATH PENALTY AND

WE SUBMIT THAT AN ACCURATE INSTRUCTION INFORMING THE JURY THAT THIS MAN WILL NEVER BE ELIGIBLE FOR PAROLE IF HIS LIFE IS SPARED IS CONSTITUTIONALLY MANDATED. IT IS NOT FORECLOSED BY ATKINS AND WE REQUEST THAT IT BE GIVEN.

THANK YOU.

THE COURT: ORDER. THE ISSUE BEFORE THE COURT IS THE QUESTION OF PAROLE OR INELIGIBILITY OF PAROLE OF THE DEFENDANT IN THIS CASE. WHAT SHOULD THE JURY BE TOLD IN THAT REGARD, IF ANYTHING? THE CIRCUIT BENCH HAS BEEN ENTRUSTED WITH THE DUTY AND RESPONSIBILITY OF THE TRIAL OF DEATH PENALTY CASES AND THE DIFFICULT ISSUE OF PAROLE IN THAT TRIAL SETTING. A PLETHORA OF AUTHORITY EXISTS IN SOUTH CAROLINA EMANATING FROM THE SOUTH CAROLINA SUPREME [Tr. 1602] COURT CONSISTING OF STATE VERSUS LARRY GENE BELL, OPINION NUMBER 23163, FILED FEBRUARY 26, 1990: STATE VERSUS RAYMOND PATTERSON, JR., OPINION NUMBER 23060, FILED AUGUST 14, 1989; STATE VERSUS ANDREWS LAVERNE SMITH, OPINION NUMBER 23016, FILED MAY 30, 1989; STATE VERSUS DONALD ALLEN JONES, OPINION NUMBER 22978, FILED MARCH 6, 1989: STATE VERSUS MATTHEWS, 296 SOUTH CAROLINA 379; 373 SOUTHEASTERN 2ND, 587, CERTIORARI DENIED; 109 SUPREME COURT, 1559; STATE VERSUS JERRY WILLIAM PLEMMONS, P-L-E-M-M-O-N-S, 296 SOUTH CAROLINA, 76; 370 SOUTHEASTERN, 2ND, 871; STATE VERSUS FRANK MIDDLETON, 295 SOUTH CAROLINA, 3318; 368

SOUTHEASTERN 2ND, 457, CERTIORARI DENIED; 109 SUPREME COURT, 189, REHEARING DENIED; 109 SUPREME COURT, 406; STATE VERSUS RICHARD CHARLES JOHNSON, 293 SOUTH CAROLINA, 321; 360 SOUTHEASTERN, 2ND, 317; STATE VERSUS JOSEPH EARNEST ATKINS, A-T-K-I-N-S, 293 SOUTH CAROLINA, 294; 360 SOUTHEASTERN, 2ND, 302; STATE VERSUS PETERSON, 287 SOUTH CAROLINA, 244; 335 SOUTHEASTERN, 2ND, 800; STATE VERSUS SOUTH, 285 SOUTH CAROLINA, 529; 331 SOUTHEASTERN, 775; CERTIORARI DENIED; 474 UNITED STATES, 888; STATE VERSUS NORRIS, 285 SOUTH CAROLINA, 86; 328 SOUTHEASTERN, 2ND, 339 AND STATE VERSUS COPELAND, 278 SOUTH CAROLINA, 572; 300 SOUTHEASTERN, 2ND, 63.

THE DEFENDANT IN THE CASE, SUB JUDICE CONTENDS THAT HIS INELIGIBILITY OF PAROLE STATUS SHOULD BE PRESENTED [Tr. 1603] TO THE JURY AS A VALID SENTENCING FACTOR. THE DEFENDANT REQUEST [sic] THE COURT TO CHARGE SECTION 24-21-640 OF THE CODE OF LAWS OF SOUTH CAROLINA, 1976 AND TO CHARGE THAT FIRST DEGREE BURGLARY AND CRIMINAL SEXUAL CONDUCT OF THE FIRST DEGREE ARE VIOLENT CRIMES. IT IS CONTENDED BY THE DEFENDANT THAT THE EXCLUSION OF THE DEFENDANT'S INELIGIBILITY FOR PAROLE VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

EDIFYING AND ENLIGHTENING IS THE RECENT PRONOUNCEMENT BY THE STATE SUPREME COURT IN REGARD TO THE ISSUE OF PAROLE ELIGIBILITY

ARTICULATED IN STATE VERSUS MICHAEL R. TORRENCE, T-O-R-R-E-N-C-E, OPINION NUMBER 23403, FILED MAY 20, 1991. TORRENCE REVEALS THE REVIEW BY THE STATE SUPREME COURT OF MAJOR PRINCIPLES OF LAW IMPACTING UPON THE TRIAL OF CASES IN THE GENERAL SESSIONS VENUE. THE HISTORIC PRINCIPLE OF IN FAVOREM VITAE IS REVIEWED IN DETAIL. AN INTERESTING STUDY AND ANALYSIS OF THAT PRINCIPLE IS PRESENTED BY THE SAGACIOUS JUSTICE TOAL. ASSOCIATE JUSTICE CHANDLER WRITING FOR THE COURT WHICH HAS THE CONCURRENCE OF CHIEF JUSTICE GREGORY, CHIEF JUSTICE ELECT HARWELL AND ASSOCIATE JUSTICE TOAL.

TORRENCE STATES, "I AGREE WITH THE CONCLUSION IN PART THREE THAT THE CHARGE OUTLINED IN STATE VERSUS ATKINS, 293 SOUTH CAROLINA, 294; 360 SOUTH CAROLINA, 2ND, 302 (1987) DOES NOT ACCURATELY REFLECT THE PAROLE INELIGIBILITY [Tr. 1604] OF THIS DEFENDANT SHOULD HE RECEIVE A LIFE SENTENCE. SEE F. CALDWELL VERSUS MISSISSIPPI, 472, UNITED STATES, 320; 336, 105 SUPREME COURT, 2633, 2643, 86 LAWYERS EDITION, 2ND, 231, 243-44 (1985). I WRITE SEPARATELY BECAUSE I BELIEVE WE SHOULD RECONSIDER ATKINS AND REINSTATE EARLIER PRECEDENT PROHIBITING CAPITAL SENTENCING JURIES FROM BEING INVOLVED ABOUT PAROLE. FOR FORTY YEARS PRIOR TO ATKINS, THIS COURT'S DECISIONS CONSISTENTLY DISAPPROVED THE PRACTICE OF PLACING THE SUBJECT OF PAROLE BEFORE THE JURY IN A DEATH PENALTY CASE. IN

STATE VERSUS HINTON, H-I-N-T-O-N, 210 SOUTH CAROLINA, 480; 43 SOUTHEASTERN, 2ND, 360 (1947) CAPITAL CONVICTIONS WERE REVERSED IN PART UPON THE SOLICITOR'S CLOSING ARGUMENT TO THE EFFECT "THAT IF THE DEFENDANTS WERE FOUND GUILTY OF MURDER BUT RECOMMENDED TO LIFE IMPRISONMENT THAT THIS WOULD NOT NECESSARILY MEAN . . . THEY WOULD SERVE A LIFE SENTENCE" ID AT 488, 43 SOUTHEASTERN, 2ND AT 363, WE COULD FIND NO JUSTIFICATION FOR SUCH ARGUMENT WHICH SUGGESTED TO THE JURY THAT A VERDICT OF DEATH "SHOULD BE RENDERED BECAUSE SOME OTHER DEPARTMENT OF THE STATE GOVERNMENT MIGHT SHORTEN OR COMMUTE A LIFE SENTENCE" ID MORE THAN TWENTY YEARS LATER, STATE VERSUS ATKINSON, 253 SOUTH CAROLINA, 531; 172 SOUTHEASTERN, 2ND, 111 (1970) ADDRESS THE APPROPRIATE RESPONSE TO A CAPITAL JURY'S QUESTION ABOUT THE POSSIBILITY OF PARDON OR OR [sic] PAROLE IN THE EVENT OF A LIFE SENTENCE. "WE ADOPTED THE [Tr. 1605] PREVAILING VIEW . . . THAT A JURY CHARGED WITH RESPONSIBILITY OF ASSESSING THE PENALTY TO BE SUFFERED BY AN ACCUSED SHOULD NOT BE INVITED BY INSTRUCTION OR ARGUMENT TO SPECULATE ON THE POSSIBLE EFFECT OF PARDON OR PAROLE UPON THE EXECUTION OF THE SENTENCE IMPOSED" ID AT 534, 172 SOUTHEASTERN, 2ND AT 112, THE RATIONALE FOR THIS VIEW WAS EXPRESSED AS FOLLOWS: THE LEGISLATURE COMMITTED TO THE JURY THE RESPONSIBILITY TO DETERMINE IN THE FIRST INSTANCE WHETHER

PUNISHMENT SHOULD BE LIFE OR DEATH. IT CHARGED ANOTHER AGENCY WITH THE RESPONSIBILITY OF DECIDING HOW A LIFE SENTENCE SHALL BE EXECUTED. THE JURORS PERFORM THEIR TASK COMPLETELY WHEN THEY DECIDE THE MATTER ASSIGNED TO THEM UPON THE EVIDENCE BEFORE THEM. WHAT HAPPENS THEREAFTER IS NO CONCERN OF THEIRS . . . THE HOLDING IN ATKINSON SERVED AS A BASIS FOR NUMEROUS DECISIONS CONCERNING THE INTRODUCTION OF PAROLE INTO THE SENTENCING PHASE OF THE BIFURCATED TRIAL PROVIDED UNDER OUR PRESENT DEATH PENALTY LAW. ALL THESE DECISION [sic] UNEQUIVOCALLY STATE THAT PAROLE IS NOT A PROPER CONSIDERATION FOR CAPITAL SENTENCING JURIES . . . FINALLY, STATE VERSUS NORRIS, 285 SOUTH CAROLINA, 86; 328 SOUTHEASTERN, 2ND, 339 (1985) SET OUT THE PROPER RESPONSE TO JURORS IN QUERY ABOUT PAROLE ELIGIBILITY. "WHEN THE ISSUE IS RAISED, THE COURT SHOULD INSTRUCT THE JURY THAT IT SHALL NOT CONSIDER PAROLE ELIGIBILITY IN REACHING ITS DECISION AND THAT THE TERMS [Tr. 1606] "LIFE IMPRISONMENT", "DEATH SENTENCE" SHOULD BE UNDERSTOOD IN THEIR ORDINARY AND PLAIN MEANING . . . IN ATKINS, THIS COURT FOLLOWED ESTABLISHED PRECEDENT HOLDING THE DEFENDANT'S REQUEST FOR INSTRUCTIONS ON PAROLE ELIGIBILITY WAS PROPERLY REFUSED. WITHOUT DISCUSSION, THE COURT PROCEEDED TO SET OUT THE FOLLOWING GUIDELINES TO BE APPLIED PROSPECTIVELY: . . . THESE INSTRUCTIONS ARE INCOMPATIBLE NOT

ONLY WITH THE RATIONALE OF THE SUBSTANTIAL BODY OF LAW PRECEDING ATKINS, BUT ALSO WITH THAT OF OUR DECISIONS WHICH FOLLOWED. "ASIDE FROM THIS LOGICAL INCONSISTENCY, THE ATKINS INSTRUCTIONS PRESENT PRACTICAL PROBLEMS IN THEIR APPLICATION. THE TRIAL COURT IS, IN EFFECT, REQUIRED TO RULE UPON A PARTICULAR DEFENDANT'S ELIGIBILITY FOR PAROLE BEFORE SENTENCE HAS EVEN BEEN IMPOSED. THIS DETERMINATION MAY INVOLVE NOVEL ISSUES OF LAW OR STATUTORY PROVISIONS WHICH HAVE NOT BEEN INTERPRETED. MOREOVER, THERE IS NO WAY TO BE ASSURED THAT THE PAROLE BOARD WOULD REACH THE SAME CONCLUSION AS THE COURT. FOR ALL OF THE STATED REASONS, I WOULD OVERRULE ATKINS TO THE EXTENT IT PERMITS THE INTRODUCTION OF PAROLE INTO THE CAPITAL SENTENCING DECISION."

THIS COURT IS COGNIZANT OF THE FACT THAT TORRENCE DOES NOT DEAL DIRECTLY WITH THE INELIGIBILITY STATUS OF THIS DEFENDANT, HOWEVER, THERE IS NO EPIPHANY NEEDED TO RECOGNIZE THAT TORRENCE IS INSTRUCTIVE TO THE CIRCUIT BENCH [Tr. 1607] IN REGARD TO THE HANDLING OF PAROLE AT THE TRIAL LEVEL. IN CONTRARIETY TO ARGUMENT OF DEFENSE COUNSEL, I CONCLUDE THAT TORRENCE SHOULD BE APPLIED IN THIS CASE. THEREFORE, IT IS ORDERED THAT COUNSEL IN THE MATTER SUB JUDICE SHALL NOT ENGAGE IN ANY DISCUSSION OR REFERENCE TO PAROLE OR PAROLE ELIGIBILITY OR PAROLE INELIGIBILITY.

FURTHER, THIS COURT WILL NOT INSTRUCT THE JURY IN THE INITIAL CHARGE. IN THE EVENT THAT THE JURY INQUIRIES [sic] ABOUT THE MATTER, THE COURT WILL USE THE PROCEDURE ARTICULATED IN STATE VERSUS JOHN FOSTER NORRIS, 328 SOUTHEASTERN, 2ND, 339. THE INSTRUCTION AT THAT TIME WILL BE AS FOLLOWS: "YOU ARE INSTRUCTED NOT TO CONSIDER PAROLE OR PAROLE ELIGIBILITY IN REACHING YOUR VERDICT. DO NOT CONSIDER PAROLE OR PAROLE ELIGIBILITY. THAT IS NOT A PROPER ISSUE FOR YOUR CONSIDERATION.

THE TERMS "LIFE IMPRISONMENT" AND "DEATH SENTENCE" ARE TO BE UNDERSTOOD IN THEIR PLAIN AND ORDINARY MEANING."

AND IT IS SO ORDER [sic]. RIGHTS ARE RESERVED. RIGHTS ARE PROTECTED FOR PURPOSES OF APPELLATE REVIEW.

MR. BRUCK: IF YOUR HONOR, PLEASE, FOR THE RECORD, THERE ARE A COUPLE OF OTHER MATTERS TO RESPOND TO YOUR RULING IF I MIGHT?

THE COURT: YES, SIR.

MR. BRUCK: I WOULD LIKE TO MAKE CLEAR AS I MAY [Tr. 1608] NOT HAVE DONE THAT THE CONSTITUTIONAL BASIS OF THE DEFENDANT'S REQUEST WAS NOT ONLY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION BUT ALSO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AND SPECIFICALLY THE RIGHT TO REBUT

EVIDENCE OF FUTURE DANGEROUSNESS OR MORE GENERALLY THE RIGHT TO REBUT EVIDENCE IN AGGRAVATION PRESENTED BY THE STATE. I WOULD LIKE THE RECORD TO REFLECT THAT.

FURTHERMORE, IN VIEW OF YOUR RULING THAT COUNSEL MAY NOT ARGUE PAROLE ELIGIBILITY, I WOULD, OF COURSE, RESPECTFULLY EXCEPT TO THE RULING AND ADDITIONALLY NOTE THE DEFENDANT'S OBJECTION TO THAT RULING UNDER THE SIXTH AMENDMENT RIGHT TO COUNSEL OF THE UNITED STATES CONSTITUTION.

FURTHERMORE, IN VIEW OF YOUR HONOR'S RULING, I HAVE TWO ADDITIONAL MOTIONS TO MAKE. ONE IS THAT THE COURT ISSUE ITS ORDER IN LIMINE BARING [sic] THE PROSECUTION FROM ARGUING TO THE JURY ANY MATTERS CONCERNING THE ALLEGED FUTURE DANGEROUSNESS, PROCLIVITY FOR VIOLENCE OR LIKELIHOOD TO COMMIT FUTURE ACTS OF VIOLENCE BY THE DEFENDANT JONATHAN SIMMONS; AND SECONDLY, THAT THE COURT INSTRUCT THE JURY THAT THE QUESTION OF THIS DEFENDANT'S FUTURE BEHAVIOR IS NOT A PROPER MATTER FOR THEIR CONSIDERATION AND THEY SHOULD PUT THAT MATTER ENTIRELY OUT OF THEIR MINDS WHILE DECIDING THE ISSUE OF SENTENCE.

IF THE COURT WOULD REQUIRE A WRITTEN INSTRUCTION [Tr. 1609] IN ORDER TO RULE ON THAT REQUEST, WE CAN FURNISH ONE BY TOMORROW. IF NOT, THEN I WOULD ASK OF THE COURT INDICATE

WHETHER THOSE TWO REQUESTS WILL BE GRANTED OR DENIED.

THE COURT: MR. SOLICITOR.

THE SOLICITOR: PLEASE THE COURT, YOUR HONOR? I THINK THE CASE LAW IS CLEAR THAT I'M ALLOWED TO ARGUE POTENTIAL – FUTURE POTENTIAL. PLUS MY UNDERSTANDING OF SKIPPER IS AND MR. BRUCK HAVING ARGUED SKIPPER IN FRONT OF THE UNITED STATES SUPREME COURT MAY KNOW BETTER THAN I, BUT MY UNDERSTANDING IS THAT FUTURE ADAPTABILITY TO PRISON LIFE IS SOMETHING HE WOULD ARGUE AND BE ALLOWED TO PRESENT TESTIMONY ON. BY THAT CHARGE WOULD HE BE, IN EFFECT, WAIVING HIS RIGHTS UNDER SKIPPER?

MR. BRUCK: I SHOULD CLARIFY THE REQUEST. THE REQUEST WAS TO CORRESPOND TO PROHIBITION OF ARGUMENT. IT WAS NOT GOING TO FUTURE ADAPTABILITY BUT TO FUTURE ACTS OF VIOLENCE OR –

THE COURT: I DECLINE TO RULE ON THAT MATTER. MY DECLINATION IS BOTTOMED AND PREMISED UPON THE FACT THAT I DO NOT HAVE SUFFICIENT INFORMATION TO RULE ON THAT MATTER UNTIL A CHARGE IS PRESENTED UNDER THE RULES.

MR. BRUCK: YES, SIR. THAT'S WITH RESPECT TO THE REQUEST OF CHARGE. AM I TO UNDERSTAND THAT YOUR HONOR HAS RULED ON THE OR THAT YOU INTEND TO RULE ON THE REQUEST TO

PROHIBIT THE SOLICITOR FROM ARGUING FUTURE DANGEROUSNESS OR [Tr. 1610] POSSIBLE ACTS OF FUTURE VIOLENCE?

THE COURT: I'M GOING TO LET HIM BE HEARD IN THAT REGARD.

THE SOLICITOR: YOUR HONOR, I BELIEVE, THE CASE LAW ALLOWS ME TO ARGUE DETERRENCE. I BELIEVE OUR SUPREME COURT HAS INDICATED THAT IS APPROPRIATE. GIVEN A FEW MOMENTS, I THINK, I COULD PROBABLY FIND A CASES [sic] THAT DEAL WITH THAT INCH. BUT I WOULD SUBMIT TO YOU THAT –

MR. BRUCK: WHILE MR. HARPOOTLIAN IS SEARCHING, IF I MIGHT MAY [sic] CLEAR THAT THE CONSTITUTIONAL BASIS OF THIS REQUEST REGARDING THE SOLICITOR'S ARGUMENT IS THE DUE PROCESS PRINCIPLE OF GARDNER VERSUS FLORIDA THAT A DEFENDANT MAY NOT BE SENTENCED TO DEATH ON THE BASIS OF INFORMATION THAT HE IS DENIED THE OPPORTUNITY TO DISPROVE OR REBUT.

THE COURT: THE CASE THAT YOU LOOK FOR, COUNSEL, I WOULD HELP YOU IS STATE VERSUS TRUESDALE, 393 SOUTHEASTERN, 2ND, 168 (1990) STATE SUPREME COURT CASE IN CASE YOU CAN'T PUT YOUR HAND ON THAT RIGHT NOW.

THE SOLICITOR: YES, SIR. I CAN PUT MY HANDS ON IT IN ABOUT TWO SECONDS. BUT MY UNDERSTANDING IS UNDER – YOUR HONOR, AS AND YOU'RE, OBVIOUSLY, AS IS ALWAYS, CORRECT.

STATE VERSUS JOE LEWIS TRUESDALE OR LEWIS JOE TRUESDALE, JR. OUR SUPREME COURT SAYS THAT TRUESDALE CHALLENGED THE SOLICITOR'S CLOSING ARGUMENT IN TWO [Tr. 1611] PARTICULARS. FIRST, HE CONTENDS THE SOLICITOR IMPROPERLY REFERRED TO THE DETERRENT EFFECT OF CAPITAL PUNISHMENT. OUR DECISION HOLDS, HOWEVER, THAT THE DETERRENCE ARGUMENT IS PROPER IN THE SENTENCING PHASE OF A CAPITAL TRIAL. STATE VERSUS JONES, 298 SOUTH CAROLINA 118, ETC.

NEXT, TRUESDALE CONTENDS THAT A REFERENCE TO OTHER CRIMINALS WAS WITHOUT SUPPORT IN THE RECORD AND CONSTITUTED EXPRESSION OF THE SOLICITOR'S PERSONAL OPINIONS. THE SOLICITOR ARGUED IN HIS ARGUMENT IS OUTLINED IN THAT DECISION. THIS ARGUMENT MERELY EMPHASIZED THAT TRUESDALE'S CRIMES WERE UNCHARACTERISTIC AND UNPREDICTABLE AND, THEREFORE, TRUESDALE WAS MORE FRIGHTENING THAN CAREER CRIMINALS. COMMENTS DO NOT COMPARE THE ROLE OR MERITS OF THIS PROSECUTION WITH OTHERS AND DISTINGUISH THEM FROM THESE HELD IMPERMISSIBLE WITH STATE VERSUS BUTLER.

IF THIS IS THE ARGUMENT THAT COUNSEL IS ATTEMPTING TO PROHIBIT IN LIMINE, I INTEND ON AND WOULD LIKE NOT TO BE PROHIBITED FROM MAKING THESE KINDS OF ARGUMENTS. I UNDERSTAND THE LIMITS. I'VE READ ALL OF THE CASES OR EXCERPTS TO THE CASES CONCERNING CLOSING ARGUMENTS. I'M NOT GOING TO TALK ABOUT

REMORSE. I'M NOT GOING TO TALK ABOUT PUTTING SIGNS UP ON THE COUNTY LINE. I'M NOT GOING TO TALK ABOUT NEVER PROSECUTING ANOTHER CAPITAL CASE. THERE ARE A NUMBER OF THINGS. I KNOW WHAT I'M NOT SUPPOSE TO TALK ABOUT. I THINK I DO HAVE SOME IDEA [Tr. 1612] WHAT I CAN TALK ABOUT HAVING DONE, PROSECUTED AROUND NINE OF THESE AND DEFENDED ONE IN MY CAREER. BUT THIS PARTICULAR OBJECTION, I DON'T BELIEVE, IS GOVERNED BY OR PROHIBITED BY OUR STATE SUPREME COURT.

MR. BRUCK: AS IT HAPPENS, YOUR HONOR, THAT IS NOT WHAT I WAS REFERRING TO ALTHOUGH MR. HARPOOTLIAN HAS OPENED A – I THINK ANOTHER CAN OF DUE PROCESS WORMS WHICH I THINK MR. QUINN HAD INTENTION – INTENDED ON DEALING WITH TOMORROW IN THE NORMAL COURSE AND PERHAPS THAT WOULD MAKE MORE SENSE. THERE ARE TWO DIFFERENT TYPES OF ARGUMENTS ABOUT DETERRENCE. THERE IS THE ARGUMENT OF GENERAL DETERRENCE. THAT IS TO SAY IF YOU EXECUTE THIS PERSON, IT MAY HELP REDUCE OTHER MURDERS. THAT WAS NOT WHAT I WAS REFERRING TO. BUT I ALSO THINK IN SOUTH CAROLINA THAT IS UNCONSTITUTIONAL FOR THE SIMPLE REASON THAT UNDER STATE LAW A DEFENDANT WHO IS PROHIBITED FROM INTRODUCING RELEVANT AND SCIENTIFICALLY VALID EVIDENCE TO DISPROVE IT.

MR. SIMMONS WOULD IF PERMITTED UNDER SOUTH CAROLINA LAW CALL – INTRODUCE EXPERT TESTIMONY BY A CRIMINOLOGIST WHICH WOULD

ESTABLISH THAT THERE IS NO BASIS UPON WHICH TO BELIEVE THAT THE DEATH PENALTY HAS A SUPERIOR GENERAL DETERRENT EFFECT TO THE PENALTY OF LIFE IMPRISONMENT. AND, IN FACT, WE SO MOVE RECOGNIZING, OF COURSE, THAT A LARGE NUMBER OF SOUTH CAROLINA'S DECISIONS BEGINNING WITH STATE VERSUS WOOMER HAVE PROHIBITED THE [Tr. 1613] ADMISSION OF THAT SORT OF EVIDENCE.

THE COURT: I WILL PRESERVE THE –

THE SOLICITOR: YOUR HONOR, PERHAPS I CAN SAVE SOME TIME ON THIS. I DON'T KNOW THAT I'M GOING TO ARGUE GENERAL DETERRENCE.

THE COURT: ALL RIGHT.

THE SOLICITOR: I DON'T KNOW THAT. I AM GOING TO ARGUE THAT ELECTROCUTING THIS YOUNG MAN OVER HERE WILL DETER HIM FROM ANY FURTHER CRIME AND, I THINK, THAT IS APPROPRIATE.

MR. BRUCK: WELL, OKAY. THAT GETS US TO WHAT I WAS ACTUALLY TALKING ABOUT BUT BEFORE I DO, I – MR. HARPOOTLIAN DID BRING UP THE ARGUMENT ABOUT GENERAL DETERRENCE. WE WOULD LIKE TO PROFFER TOMORROW MORNING IF WE COULD, THE TRANSCRIPT OF THE TESTIMONY OF PROFESSOR PATERNOSTER, P-A-T-E-R-N-O-S-T-E-R, WHICH WAS HEARD IN WOOMER. I'LL ADMIT THAT IT WAS EXPRESSLY DISAPPROVED BY OUR SUPREME COURT IN WOOMER. HOWEVER, IT –

OUR VIEW THAT IT SHOULD BE ADMITTED WHENEVER THE PROSECUTOR INTENDS TO ARGUE THE CONTRARY PROPOSITION. NOW, MR. HARPOOTLIAN NOW INFORMS US THAT HE'S NOT GOING TO ARGUE GENERAL DETERRENCE, OF COURSE, WE WON'T KNOW THAT UNTIL HE ARGUES.

THE COURT: JUST HAVE THAT READY FOR THE RECORD.

MR. BRUCK: YES, SIR. ON THE ARGUMENT OF THE SPECIFIC DETERRENCE, THAT IS, DETERRENCE OF MR. SIMMONS, [Tr. 1614] NORMALLY I WILL CONCEDE THAT THAT IS PROPER ARGUMENT, HOWEVER, IT IS IMPOSSIBLE FOR MR. SIMMONS FOR THE REASONS I'VE OUTLINE [sic] AND WILL NOT, OF COURSE, REPEAT TO RESPOND TO THAT ARGUMENT UNLESS THE JURY IS GIVEN ACCURATE AND FULL INFORMATION ABOUT WHERE IT IS THAT MR. SIMMONS WILL SPEND THE REST OF HIS LIFE, NAMELY IN PRISON DUE TO HIS INELIGIBILITY FOR PAROLE. AND FOR THAT REASON, WE THINK, THAT THE BASIC DUE PROCESS RIGHT OF REBUTTAL IN GARDNER VERSUS FLORIDA MEANS THAT BECAUSE THE COURT HAS AND I RESPECT YOUR HONOR'S RULING DECLINED TO GIVE SUCH AN INSTRUCTION, IT BECOMES AN INDEPENDENT CONSTITUTIONAL VIOLATION OF MR. SIMMONS' RIGHTS FOR MR. HARPOOTLIAN TO ARGUE SPECIFIC DETERRENCE AND BY IMPLICATION MS. [sic] SIMMONS' FUTURE DANGEROUSNESS BECAUSE WE JUST CAN'T MEET THAT ARGUMENT.

THE SOLICITOR: WELL, YOU HONOR, THAT'S FALLACIOUS. HE COULD KILL SOMEBODY JUST AS PEEWEE GASKINS DID IN PRISON. WE ARE NOT TALKING ABOUT DETERRENT – WHEN I TALK ABOUT DETERRING HIM, I'M TALKING ABOUT DETERRING HIM FROM KILLING ANY OTHER HUMAN BEING. AND JUST BECAUSE PEEWEE GASKINS BLEW UP TYNER DOESN'T MEAN AND HE WAS SERVING A LIFE SENTENCE I MIGHT POINT OUT AT THAT TIME, SEVERAL OF THEM. THAT'S FALLACIOUS. WE WOULD LIKE TO MOVE ON TO OTHER ISSUES IF POSSIBLE, YOUR HONOR.

THE COURT: WELL, LET ME CLEAR THE RECORD SO AS [Tr. 1615] TO PROTECT ALL RIGHTS. ADDENDUM TO THE ORDER. THE COURT SPECIFICALLY CONSIDERS THE ARGUMENT AS POSITED BY COUNSEL IN REFERENCE TO THE SIXTH AMENDMENT AND THE FOURTEENTH AMEND. THE ARGUMENT IS REJECTED AND IT IS SO ORDER [sic].

MR. BRUCK: UH – DO I UNDERSTAND THAT YOUR HONOR HAS ALSO DECLINED OUR MOTION IN LIMINE TO PROHIBIT THE SOLICITOR FROM ARGUING THE FUTURE DANGEROUSNESS OF MR. SIMMONS?

THE COURT: NO, SIR, YOU – MAYBE WE ARE NOT ON THE SAME CIRCUIT. YOU OBJECTED TO MY ORDER AS ARTICULATED INTO THE RECORD AND YOU WANTED ME TO COVER OTHER THINGS. DID I NOT UNDERSTAND THAT?

MR. BRUCK: YES, SIR.

THE COURT: AND I WAS TRYING TO GIVE YOU PROTECTION SO AS TO RULE SPECIFICALLY ON THOSE. I HAD REFERRED WITH SPECIFICITY TO THE EIGHTH AMENDMENT IN MY ORDER AND YOU SAID YOU ALSO WERE RELYING ON THE SIXTH AMENDMENT, THE FOURTEENTH AMENDMENT –

MR. BRUCK: YES, SIR –

THE COURT: – AND I JUST WANTED TO PUT ON THE RECORD THAT I REJECT THOSE.

MR. BRUCK: VERY WELL.

THE COURT: I HAD LET YOU LAWYERS ENGAGE IN WHAT IS CALLED PERIPHRASIS.

THE SOLICITOR: I'M SORRY, YOUR HONOR?

[Tr. 1616] THE COURT: PERIPHRASIS. I'LL SPELL IT FOR YOU.

THE SOLICITOR: I WAS GOING TO CHALLENGE YOU TO DO THAT, YOUR HONOR.

THE COURT: P-E-R-I-P-H-R-A-S-I-S, WEBSTER. I MEAN I KNOW I COME FROM BUCOLIC BACKGROUND, FLORENCE COUNTY OUT IN THE COUNTRY. I UNDERSTAND THAT.

THE SOLICITOR: I WOULD NOTE THAT IS THE SAME COUNTY OF OUR CHIEF JUSTICE ELECT, YOUR HONOR, FOR WHOEVER MIGHT READ THIS RECORD DOWN THE LINE. A LONG LINE OF OUTSTANDING JURISTS HAVE COME FROM THAT COUNTY. ARE WE DONE?

MR. BRUCK: WE WILL – I WILL REDUCE THE OTHER MOTIONS I MADE IN WRITING, YOU HONOR. I THINK, MR. QUINN IS SUBMITTING THEM IN THE MORNING.

THE COURT: AND THE REQUESTED CHARGE, NOW NEEDS TO BE IN WRITING, COUNSEL, FOR THE RECORD.

MR. BRUCK: YES, SIR. VERY WELL.

* * *

[Tr. 1648] MR. QUINN: YOUR HONOR, I HAVE A FEW OTHER MATTERS BEFORE WE PROCEED.

THE COURT: OKAY. ALL RIGHT.

MR. QUINN: YOUR HONOR, I HAVE REDUCED MOST OF THE MOTIONS THAT I HAVE MADE IN THIS TRIAL TO WRITING AND WE WILL NEED TO ARGUE A COUPLE OF THOSE IN JUST A MOMENT. BUT BASED ON YOUR HONOR'S RULINGS YESTERDAY, I HAVE TWO MOTIONS I WOULD LIKE TO PUT IN THE RECORD.

FIRST, THAT THE DEFENDANT REQUEST AT THIS POINT IN VIEW OF YOUR HONOR HAVING DECLINED TO INSTRUCT THE JURY CONCERNING THE DEFENDANT'S STATUTORY INELIGIBILITY FOR THE PAROLE, THAT THE COURT ISSUE AN ORDER AT THIS TIME PROHIBITING THE COUNSEL FROM THE STATE FROM ARGUING OR IMPLYING THAT THE DEFENDANT WILL POSE A RISK OF FUTURE VIOLENT BEHAVIOR TO SOCIETY UNLESS SENTENCED TO DEATH. THIS MOTION IS BASED ON GARDNER

VERSUS FLORIDA WHICH WAS CITED YESTERDAY AND YOUR HONOR HAS THE CITE AND THE HOLDING IN GARDNER THAT NO DEFENDANT SHOULD BE A [sic] SENTENCED TO DEATH BASED UPON ANY CONSIDERATION THAT HE IS PRECLUDED FROM EXPLAINING OR REBUTTING.

[Tr. 1649] THE COURT: YES, MR. SOLICITOR.

THE SOLICITOR: I THOUGH YOU RULED ON THAT YESTERDAY, YOUR HONOR.

THE COURT: WELL, I GAVE THEM THE RIGHT TO PRESENT A SPECIFIC REQUEST INSOFAR AS THE RECORD IS CONCERNED.

THE SOLICITOR: AND I WOULD ASK YOU TO RULE TODAY THE SAME WAY YOU RULED YESTERDAY.

THE COURT: THE REQUEST BY THE DEFENSE IS DENIED WITH THIS CAVEAT. OBVIOUSLY, I WILL LISTEN CAREFULLY TO THE ARGUMENT OF THE SOLICITOR TO SEE IF IT CONTRAVENES THE ACTUAL FACTUAL CIRCUMSTANCE. CERTAINLY, I RECOGNIZE THE RIGHT OF THE STATE TO ARGUE CONCERNING THE DEFENDANT'S DANGEROUS PROPENSITY. I WILL NOT ALLOW THE SOLICITOR, FOR EXAMPLE, TO SAY TO THE JURY ANYTHING THAT WOULD INDICATE THAT THE DEFENDANT IS NOT GOING TO BE JAILED FOR THE PERIOD OF TIME THAT IS ENCOMPASSED WITHIN THE ACTUAL LAW. THE FACT THAT WE DO NOT SUBMIT THE PAROLE ELIGIBILITY TO THE JURY DOES NOT NEGATE THE FACT THAT THE SOLICITOR

MUST STAY WITHIN THE TRIAL RECORD. TO SUM UP, THE SOLICITOR MUST STAY WITHIN THE TRIAL RECORD.

THE SOLICITOR: YOUR HONOR, I AT THIS POINT THEN WOULD URGE THE COURT TO REMIND DEFENSE COUNSEL THAT UNDER STATE VERSUS RICHARD STEWART, THEY ARE NOT TO MAKE ANY REPRESENTATIONS TO THE JURY AS TO WHAT SENTENCE MAY MEAN OR [Tr. 1650] NOT MEAN. IN THAT CASE, YOU REMEMBER THE DEFENSE ATTORNEY TOLD THE JURY HE WILL REMAIN IN JAIL FOR THE REST OF HIS NATURAL LIFE.

THE COURT: THAT IS CORRECT. NO QUESTION ABOUT THAT. WHAT'S YOUR NEXT MATTER, COUNSEL?

* * *

[Tr. 1653] [THE COURT:] MR. FOREMAN AND MEMBERS OF THE JURY, PLEASE, [Tr. 1654] PLEASE, GIVE ME YOUR ATTENTION. YOU HAVE FOUND THE DEFENDANT, JONATHAN DALE SIMMONS, GUILTY OF MURDER. WE NOW HOLD THIS TRIAL. IN THIS TRIAL, THE ISSUE IS PRESENTED TO YOU, WHAT SENTENCE SHALL YOU GIVE TO THE DEFENDANT, JONATHAN DALE SIMMONS? TWO OPTIONS. ONE, LIFE IMPRISONMENT; TWO, DEATH PENALTY. WE NOW PROCEED WITH THE PRESENTATION OF THIS MATTER TO YOU.

PLEASE, PLEASE, PLEASE, GIVE IT YOU URGENT ATTENTION.

MR. SOLICITOR, YOU ARE RECOGNIZED.

THE SOLICITOR: PLEASE THE COURT, YOUR HONOR? AT THE OUTSET, YOUR HONOR, WE WOULD MOVE TO INCORPORATE ALL OF THE EVIDENCE, TESTIMONY AND EXHIBITS WHICH THE STATE INTRODUCED IN THE FIRST PHASE OF THIS TRIAL, THAT, IS THE GUILT OR INNOCENCE STAGE, INTO THE RECORD FOR THE JURY'S CONSIDERATION AS TO THIS PORTION OF THE TRIAL.

THE COURT: THAT IS GRANTED WITH THIS SPECIFIC RULING. ALL RIGHTS ARE PROTECTED; ALL RIGHTS ARE RESERVED IN REGARD TO PRIOR RULINGS MADE IN THAT TRIAL PROCEEDING. AND IT IS SO ORDER [sic].

THE SOLICITOR: PLEASE THE COURT, YOUR HONOR? AT THIS TIME, I WOULD REQUEST THE COURT'S PERMISSION TO PUBLISH CERTAIN MATTERS TO THE JURY.

THE COURT: YOU MAY PROCEED. PLEASE IDENTIFY THE EXHIBIT NUMBER.

[Tr. 1655] THE COURT [sic]: YOUR HONOR, THEY ARE COURT'S EXHIBIT. I WILL DESCRIBE THEM.

THE COURT: PROCEED.

THE SOLICITOR: AND AS I UNDERSTAND IT THE DOCUMENTS THEMSELVES WILL NOT BE SUBMITTED TO THE JURY MERELY MY PUBLICATION.

THE COURT: THAT'S CORRECT.

THE SOLICITOR: THE FIRST ONE IS AN INDICTMENT 91-GS-32-134, THE STATE OF SOUTH

CAROLINA, COUNTY OF LEXINGTON. THE STATE VERSUS JONATHAN DALE SIMMONS. IT IS AN INDICTMENT FOR CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE. IT ALLEGES THAT JONATHAN DALE SIMMONS DID IN LEXINGTON COUNTY ON OR ABOUT JUNE 15, 1990 COMMIT THE CRIME OF CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE UPON THE VICTIM, ESTELLE SIMMONS, A 71-YEAR-OLD WIDOW. IN THAT JONATHAN DALE SIMMONS DID WILLFULLY, FELONIOUSLY AND UNLAWFULLY ENGAGE IN SEXUAL INTERCOURSE WITH THE VICTIM AND WHILE DOING SO DID USE PHYSICAL FORCE AND OR PHYSICAL VIOLENCE OF A HIGH AND AGGRAVATED NATURE TO OVERCOME THE VICTIM AND TO ACCOMPLISH THE AFOREMENTIONED SEXUAL BATTERY IN VIOLATION OF SECTION 16-3-652 OF THE 1976 SOUTH CAROLINA CODE OF LAWS AS AMENDED. AGAINST THE PEACE AND DIGNITY OF THE STATE, AND CONTRARY TO THE STATUTE IN SUCH CASE MADE AND PROVIDED. SIGNED BY THE SOLICITOR.

THE RECORD FURTHER – THE INDICTMENT FURTHER [Tr. 1656] INDICATES THAT THE DEFENDANT, JONATHAN D. SIMMONS WAS PUT TO THE BAR AND UPON HIS ARRAIGNMENT PLED GUILTY TO CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE ON JUNE 19, 1991.

THE SECOND DOCUMENT, YOUR HONOR, FOR THE RECORD IS AN INDICTMENT 91-GS-32-135, THE STATE VERSUS JONATHAN DALE SIMMONS. THE INDICTMENT ALLEGES THAT JONATHAN DALE SIMMONS DID IN LEXINGTON COUNTY ON OR ABOUT

AUGUST 2, 1989, COMMIT THE CRIME OF CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE UPON THE VICTIM, MS. MARIE FURTICK, A 71-YEAR-OLD WIDOW IN THAT JONATHAN DALE SIMMONS DID WILLFULLY, FELONIOUSLY AND UNLAWFULLY ENGAGE IN SEXUAL INTERCOURSE WITH THE VICTIM AND WHILE DOING SO DID USE PHYSICAL FORCE AND OR PHYSICAL VIOLENCE OF A HIGH AND AGGRAVATED NATURE TO OVERCOME THE VICTIM AND TO ACCOMPLISH THE AFOREMENTIONED SEXUAL BATTERY IN VIOLATION OF SECTION 16-3-652 OF THE 1976 SOUTH CAROLINA CODE OF LAWS AS AMENDED.

ALSO, THAT JONATHAN DALE SIMMONS DID IN LEXINGTON COUNTY OR [sic] ABOUT AUGUST 2, 1989, ENTER THE DWELLING OF ANOTHER WITHOUT CONSENT TO WIT: THE RESIDENCE OF MS. MARIE FURTICK LOCATED AT 3082 PRINCETON ROAD WITH INTENT TO – PRICETON [sic] ROAD WITH THE INTENT TO COMMIT A CRIME THEREIN ACCOMPANIED BY CIRCUMSTANCES OF AGGRAVATION TO WIT: THE DEFENDANT, JONATHAN DALE SIMMONS, DID CAUSE GREAT AND SEVERE PHYSICAL INJURY TO THE VICTIM, MS. MARIE FURTICK AS INDICATED BY THE CRIMINAL SEXUAL CONDUCT COUNT. AND THE [Tr. 1657] ENTERING AND OR REMAINING OCCURRED DURING THE NIGHTTIME HOURS IN VIOLATION OF 16-11-311, 1976 SOUTH CAROLINA CODE OF LAWS AS AMENDED. AGAINST THE PEACE AND DIGNITY OF THE STATE, AND CONTRARY TO THE STATUTE IN SUCH CASE MADE AND PROVIDED.

FURTHER, THE COURT RECORD INDICATES, YOUR HONOR, THAT THE DEFENDANT, JONATHAN SIMMONS, WAS PUT TO THE BAR AND ARRAIGNED AND UPON HIS ARRAIGNMENT PLED GUILTY TO THE CHARGES OF CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE AND BURGLARY IN THE FIRST DEGREE ON JUNE 19, 1991, IN LEXINGTON COUNTY.

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[Tr. 1878] MRS. SHEALY: MR. BOYLE, I JUST HAVE A COUPLE MORE QUESTIONS. EARLIER WHEN I WAS ASKING YOU ABOUT YOUR PRIOR EXPERIENCE, I THINK, YOU INDICATED YOU WORKED OUT AT THE DEPARTMENT OF CORRECTIONS?

A YES, THAT'S CORRECT.

Q OKAY. IF YOU COULD TELL THE JURY, PLEASE, WHAT YOU DID OUT THERE?

A OKAY. AS I MENTIONED EARLIER, INITIALLY – FOR THE FIRST YEAR I WAS WITH THE DEPARTMENT OF CORRECTIONS, I WORKED IN THE MENTAL HEALTH UNIT FOR THE DEPARTMENT OF CORRECTIONS TAKING CARE OF IN-PATIENT PSYCHIATRIC CLIENTS. I THEN MOVED TO CENTRAL CORRECTIONAL INSTITUTION IN COLUMBIA AS A SOCIAL WORKER IN A UNIT CALLED THE TRANSITIONAL CARE UNIT, THE MISSION OF WHICH WAS TO TAKE INMATES WHO WERE HAVING DIFFICULTY ADJUSTING TO LIVING WITHIN THE DEPARTMENT OF CORRECTIONS AND PROVIDE THEM WITH THE KIND OF THE COPING SKILLS AND KNOWLEDGE AND SO

FORTH THAT THEY NEEDED TO ADJUST TO PRISON LIFE.

[Tr. 1879] Q AND AS A PART OF PREPARING FOR YOUR SOCIAL HISTORY IN THIS CASE, I BELIEVE, YOU INDICATED YOU REVIEWED THE RECORDS OF JONTHAN [sic] SIMMONS FROM THE RICHLAND COUNTY DETENTION CENTER?

A YES, MA'AM, I DID.

Q OKAY. COULD YOU TELL THE JURY, PLEASE, WHAT DIFFICULTIES JONATHAN HAD AT THE DEPARTMENT OF – EXCUSE ME, AT THE RICHLAND COUNTY DETENTION CENTER WHEN HE WAS FIRST INCARCERATED?

A DURING HIS INITIAL, COUPLE OF MONTHS OF INCARCERATION, THERE WERE SOME REPORTED SUICIDE ATTEMPTS WHICH WERE BELIEVED BY MENTAL HEALTH AUTHORITIES TO BE MANIPULATIVE. THERE WAS ONE REPORT OF JONATHAN EATING FECES AND THERE WAS ALSO A REPORT OF ONE CONFRONTATION WITH THE DETENTION CENTER OFFICERS, APPARENTLY NOT A VERY SERIOUS ONE. THEY DON'T GO INTO ANY DETAIL ABOUT IT.

Q OKAY. DO YOU RECALL THE LAST DATE THAT HE HAD ANY PROBLEM AT THE RICHLAND COUNTY DETENTION CENTER?

A I DO NOT RECALL THE EXACT DATE BUT IT WAS SOMETIME AROUND MID-AUGUST OF LAST YEAR.

Q BASED ON YOUR EXPERIENCE AND WORKING OUT AT THE DEPARTMENT OF CORRECTIONS

AND BASED ON YOUR REVIEW OF THE RICHLAND COUNTY DETENTION CENTER RECORDS CONCERNING JONATHAN SIMMONS AND BASED ON YOUR MEETINGS WITH JONATHAN SIMMONS, DO YOU HAVE AN OPINION AS TO WHETHER OR NOT HE [Tr. 1880] WOULD BE ADAPTABLE TO PRISON LIFE?

A YES, AND LET ME EXPLAIN I DID MORE THAN MEET WITH JONATHAN. I ALSO OBSERVED JONATHAN IN A LIVING AREA WITH OTHER INMATES FOR A NUMBER OF MINUTES. I TALKED BRIEFLY TO ANOTHER INMATE ABOUT HIM. I TALKED TO CORRECTIONAL OFFICERS AND TO SUPERVISORS ABOUT HIM. I INTERVIEWED HIM REGARDING HIS FEELINGS, REGARDING HIS ABILITY TO GET BY IN PRISON AND IT WAS MY CONCLUSION THAT JONATHAN CAN AND WILL READILY ADAPT TO BEING IN PRISON SHOULD THAT BE THE SENTENCE THAT HE IS GIVEN.

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[Tr. 1893] THE WITNESS: MY NAME IS JAMES R. EVANS, E-V-A-N-S.

DIRECT EXAMINATION BY MR. BUNCH:

Q DR. EVANS, DO YOU LIVE IN COLUMBIA?

A I DO.

Q AND I REFER TO YOU AS DOCTOR, WHAT DO YOU DO?

A I TEACH AT THE UNIVERSITY IN THE DEPARTMENT OF THE PSYCHOLOGY AND I ALSO HAVE A PART-TIME PRIVATE PRACTICE.

[Tr. 1894] Q OKAY. SEE IF YOU COULD GET A LITTLE CLOSER TO THE MICROPHONE. I'M HAVING A LITTLE TROUBLE HEARING YOU.

A ALL RIGHT.

Q YOU HAVE A PART-TIME PRIVATE PRACTICE?

A YES, SIR.

Q WHAT DO YOU TEACH AT THE UNIVERSITY?

A ABNORMAL PSYCHOLOGY AND PSYCHOLOGY OF LEARNING DISABILITIES.

Q ALL RIGHT. AND WHAT IS YOUR PRACTICE IN? WHAT TYPE OF PRACTICE DO YOU HAVE?

A CLINICAL AND SCHOOL PSYCHOLOGY. IT'S A RATHER BROAD PRACTICE INCLUDING EVALUATION OF CHILDREN WITH LEARNING PROBLEMS, MENTAL RETARDATION, EVALUATION OF PSYCHOLOGICAL - GENERAL PSYCHOLOGICAL EVALUATIONS, PSYCHOTHERAPY, HYPNOTHERAPY, NEUROPSYCHOLOGY.

Q OKAY. DO YOU WORK WITH THE DEPARTMENT OF CORRECTIONS?

A YES, I DO.

Q DO YOU WORK WITH ANY OTHER STATE AGENCIES?

A I DO SOME TESTING FOR VOCATIONAL REHABILITATION.

Q DO YOU WORK FOR THE - WELL, TELL ME WHAT YOU DO WITH THE DEPARTMENT OF THE CORRECTIONS?

A I TEST INMATES FOR SUITABILITY FOR PAROLE AND SUITABILITY FOR PROMOTION TO DIFFERENT CUSTODY STATUS.

Q OKAY. TELL THE JURY WHAT YOUR EDUCATION IS, DR. [Tr. 1895] EVANS.

A I HAVE A P.H.D. IN PSYCHOLOGY AND - FROM THE BEGINNING, YOU MEAN?

Q WELL, WHEN DID YOU GRADUATE FROM COLLEGE?

A IN 1952.

Q AND WHEN DID YOU START YOUR - AT THAT TIME, WAS IT A PSYCHOLOGY EDUCATION OR DID YOU GET THAT LATER ON?

A NO, SIR, I WAS A TEACHER FOR AWHILE. I TAUGHT HIGH SCHOOL.

Q OKAY. AND THEN WHEN DID YOU GET INTO THE PSYCHOLOGICAL FIELD OF EDUCATION?

A 1960, 1961.

Q AND WHAT DEGREE DID YOU GET AT THAT TIME?

A MASTERS DEGREE IN SCHOOL PSYCHOLOGY.

Q AND HAVE YOU GOT OTHER PSYCHOLOGICAL DEGREES? YOU JUST MENTIONED YOU WERE A - HAD A DOCTORAL DEGREE. DO YOU HAVE -

A I HAVE A P.H.D. IN PSYCHOLOGY AND I HAVE DONE POST DOCTORAL WORK IN NEUROPSYCHOLOGY AT THE LANGLEY PORTER(SIC) NEUROPSYCHIATRIC INSTITUTE IN SAN FRANCISCO,

THE MEDICAL COLLEGE OF GEORGIA AND THE UNIVERSITY OF GEORGIA.

Q DO YOU HAVE A MASTERS DEGREE ALSO?

A YES, SIR.

Q TELL ME ABOUT YOUR – HOW LONG HAVE YOU HAD CLINICAL EXPERIENCE?

[Tr. 1896] A ABOUT THIRTY YEARS.

Q AND HOW ABOUT – DO YOU HAVE HOSPITAL PRIVILEGES?

A I HAVE HOSPITAL PRIVILEGES AT BAPTIST AND AT CHARTER RIVERS AND AT THE RHODES CENTER IN ORANGEBURG.

Q TELL THE JURY WHAT A HOSPITAL PRIVILEGE IS?

A IT ALLOWS YOU TO GO IN AND DO PSYCHOLOGICAL EVALUATIONS OR PSYCHOTHERAPY IN THE PSYCHIATRIC WARD.

Q ARE YOU A MEMBER OF ANY PROFESSIONAL ASSOCIATIONS?

A AMERICAN PSYCHOLOGICAL ASSOCIATION, THE NATIONAL ACADEMY OF NEUROPSYCHOLOGISTS, THE SOUTH CAROLINA ACADEMY – OR THE SOUTH CAROLINA ASSOCIATION OF PROFESSIONAL PSYCHOLOGISTS.

Q AND DO YOU HOLD ANY PROFESSIONAL CERTIFICATIONS?

A LICENSED IN CLINICAL AND SCHOOL PSYCHOLOGY.

Q YOUR HONOR, WE WOULD OFFER DR. EVANS AS AN EXPERT WITNESS IN THE AREA OF PSYCHOLOGY?

THE SOLICITOR: NO OBJECTION.

THE COURT: HE'S QUALIFIED. YOU MAY PROCEED.

MR. BUNCH: ALL RIGHT. DR. EVANS, AT OUR REQUEST, DID YOU EXAMINE JONATHAN SIMMONS?

A I DID.

Q WHAT DID YOUR EXAMINATION CONSISTS [sic] OF?

A I ADMINISTERED A BATTERY OF PSYCHOLOGICAL TESTS INCLUDING AN INTELLIGENCE TEST, AN ACHIEVEMENT TEST, SOME NEUROPSYCHOLOGICAL TYPE TESTS, RORSCHACH, A DISSOCIATION [Tr. 1897] QUESTIONNAIRE, ACHIEVEMENT TESTS.

Q OKAY. DID YOU REVIEW HIS SOCIAL HISTORY?

A I REVIEWED HIS SOCIAL HISTORY, YES, SIR.

Q ALL RIGHT. TELL THE JURY AT – SUMMARIZE FOR THE JURY WHAT YOUR – FIRST OF OVER ALL, LET ME ASK YOU THIS QUESTION. THE TESTS THAT YOU DID AND THE SOCIAL HISTORY THAT YOU DID, IS THIS THE TYPE OF TESTING AND INFORMATION WHICH AN EXPERT IN YOUR FIELD WOULD COMMONLY RELY UPON IN REACHING A DIAGNOSIS?

A YES, IT IS.

Q ALL RIGHT. TELL THE JURY IN A SUMMARY FASHION WHAT YOUR DIAGNOSIS WAS AND THEN WE'LL GO INTO THE REASONS FOR THAT DIAGNOSIS?

A I DIAGNOSED JONATHAN SIMMONS AS HAVING A NONSPECIFIC DISSOCIATIVE DISORDER.

Q ALL RIGHT. WHAT IS A NONSPECIFIC DISSOCIATIVE DISORDER?

A EACH OF US HAS THOUGHTS, FEELINGS, ENGAGE IN BEHAVIORS. WE FEEL THOSE ARE – THOSE BELONG TO US. WE FEEL THOSE ARE, IN THEIR TOTALITY ARE, MAKE UP ONE'S PERSONALITY OR ONE'S CONSCIOUSNESS. SOMETIMES – WELL, USUALLY THEY ARE INTEGRATED. WE FEEL THEY ARE – WE ARE A WHOLE UNIT. I AM WHO I AM. YOU ARE WHO YOU ARE. SOMETIMES IT WILL BE A DISINTEGRATION OF THAT. A DISSOCIATION IT'S CALLED IN WHICH SOME PARTS OF A [Tr. 1898] PERSONALITY MAY SPLIT OFF. SOME PARTS OF THE CONSCIOUSNESS MAY SEEM FOREIGN LIKE I'M NOT SURE I REALLY DID THAT. I'M NOT SURE I DID THAT BEHAVIOR OR DID SOMEBODY ELSE DO IT. I'M NOT SURE THAT WAS MY THOUGHT OR WAS IT SOMEBODY ELSE'S THOUGHT? DID I FEEL THAT WAY OR WHY DO I FEEL THIS WAY. IS SOMEONE MAKING ME FEEL THIS WAY. THESE SORTS OF WHO AM I QUESTIONS AND IN THE EXTREME, IT BECOMES WHAT'S KNOWN AS A MULTIPLE PERSONALITY WHERE YOU MAY HAVE SEVERAL DISTINCT PERSONALITIES THAT FUNCTION INDEPENDENTLY AND FLIP IN

AND OUT AS IN THE THREE FACES OF EVE. BUT IN A NON-DISSOCIATIVE – I MEAN, NONSPECIFIC DISSOCIATIVE DISORDER, THERE ARE VARIATIONS. THERE ARE DEGREES OF THAT IN WHICH ONE MAY HAVE OCCASIONAL PERIODS OF WONDERING WHO HE IS OR SHE IS BUT ALSO AMNESIA FOR CERTAIN MEMORIES. SOMETIMES ENGAGING IN BEHAVIORS AND SORT OF FEELING LIKE YOU ARE NOT DOING IT BUT STANDING ASIDE AND WATCHING SOMEONE DO IT AND EVEN MAY BE FEELING GREAT CONCERN ABOUT THE PERSON DOING IT BUT THINKING, WELL, IT'S NOT ME. IT CAN'T STOP IT. THAT'S A DISSOCIATIVE DISORDER.

Q IS THIS TYPE OF BEHAVIOR TRANSIENT? WHAT I MEAN BY THAT, DOES IT COME AND GO OR IS IT PRESENT AT ALL TIMES?

A THERE ARE – IT'S ON A WIDE CONTINUUM. THERE ARE SOME CASES WHERE IT'S TRANSIENT AND THERE ARE SOME CASES WHERE IT CAN HAPPEN REAL FAST. I MEAN, THEY MAY SUDDENLY GO INTO THIS STATE AND THEN BE OUT OF IT OR THEY MAY SLOWLY [Tr. 1899] GO IN AND COME OUT. IT MAY OCCUR JUST AT CERTAIN TIMES IN THEIR LIFE OR IT MAY OCCUR QUITE CHRONICALLY THROUGHOUT THEIR LIVES. AND THE MEMORIES, FOR EXAMPLE, MIGHT BE GONE NOW BUT THE NEXT DAY, THEY MIGHT COME BACK.

Q DR. EVANS, TELL THE JURY THE RATIONALE OR THE REASONS BEHIND YOUR CONCLUSION THAT JONATHAN SIMMONS HAD A NONSPECIFIC DISSOCIATED DISORDER?

A WELL, WHEN I FIRST WENT IN TO EVALUATE JONATHAN, IT WAS FOR A NEUROPSYCHOLOGICAL EVALUATION PRIMARY BECAUSE HE HAD HAD THIS WOUND AND THEY THOUGHT IT MAYBE WAS CAUSING HIM SOME BRAIN DAMAGE. AND AT FIRST, HE BEGAN BEHAVING IN A VERY PECULIAR FASHION. IT LOOKED LIKE HE WAS JUST MALINGERING. I MEAN, HE WAS – FOR EXAMPLE, I'D SAY, WHAT ARE THE COLORS IN THE AMERICAN FLAG AND HE'D SAY RED, WHITE AND ORANGE AS IF HE WERE JUST MALINGERING AND I THOUGHT, WELL, THAT'S WHAT THIS IS. AND THEN LONG ABOUT AN HOUR INTO –

Q MALINGERING – WHAT DO YOU MEAN BY MALINGERING?

A BY MALINGERING, FAKING. WANTING TO FAKE BAD. WANTING ME TO THINK THAT HE DIDN'T KNOW ANYTHING, HE WAS RETARDED AND CRAZY AND ALL. TO USE THE WORDS HE MIGHT USE IN THAT REGARD.

AFTER ABOUT AN HOUR INTO THE EVALUATION, I ASKED HIM A QUESTION AND HE SAID WELL, MAYBE, I THINK, IT WAS MICHAEL COULD ANSWER THAT ONE. AND I SAID MICHAEL? HE [Tr. 1900] SAID YES, MICHAEL. AND I SAID WELL, WHO IS MICHAEL AND HE SAID A FRIEND OF MINE. I CAN GET HIM TO ANSWER FOR ME. AND I SAID, DO YOU HAVE OTHER FRIENDS AND HE SAID YES. AND THEN HE PROCEEDED TO NAME A BUNCH OF THEM AND TELL ME THE DATES THEY WERE BORN. IT WAS DAMON AND PHILLIP, THE PHILOSOPHER AND

OTHER – TWO OR THREE OTHERS THAT HE NAMED. AND I SAID HOW LONG HAVE THESE PEOPLE BEEN AROUND AND HE SAID OH, A LONG TIME. AND HE SAID I GO BY MANY NAMES. SO THEN I WAS BEGINNING TO THINK, WELL, OKAY, EITHER HE'S SMARTER THAN THE PREVIOUS INTELLIGENCE TESTS HAD SHOWN AND HE'S REALLY STILL FAKING BAD AND NOW HE WANTS ME TO THINK HE'S A MULTIPLE PERSONALITY OR HE REALLY DOES HAVE SOME TYPE OF DISSOCIATED DISORDER. SO, I THEN PROCEEDED WITH THE INTERVIEW WONDERING IN MY MIND WHAT'S GOING ON HERE OR IS HE PSYCHOTIC, IS HE SCHIZOPHRENIC. I'M NOT SURE YET WHAT'S GOING ON BUT I HAVE THESE DIFFERENT POSSIBILITIES AND THEN I STARTED QUESTIONING HIM ABOUT SEXUAL ABUSE BECAUSE I HEARD THAT THERE WAS A RUMOR OF SEXUAL ABUSE. AND HE SAID JONATHAN WAS MOLESTED BY HIS GRANDMA. AND I SAID WERE YOU MOLESTED BY YOUR GRANDMOTHER? HE SAID JONATHAN WAS MOLESTED BY HIS GRANDMA AS IF HE WERE IN THE THIRD PERSON, AS IF HE COULD NOT ACTUALLY, IN FACT, ADMIT THAT IT HAD HAPPENED TO HIM AND AS IF HE WERE TALKING THROUGH A THIRD PERSON. I STILL WASN'T SURE OF WHAT WAS GOING ON AND I REQUESTED TO COME BACK A WEEK LATER.

[Tr. 1901] Q DR. EVANS –

A – A MONTH LATER –

Q – SO, ONE OF YOUR REASONS AT REACHING THIS CONCLUSION WOULD HAVE BEEN HIS RELATING TO YOU THESE DIFFERENT PEOPLE?

A YES.

Q OR –

A YES, THIS IS –

Q – AND TALKING IN THE THIRD PERSON?

A YES, SIR, THIS IS LIKE HE WAS STANDING ASIDE AND WATCHING A THIRD PERSON. IT HAD HAPPENED TO A THIRD PERSON. LIKE HE HAD ADOPTED OTHER PERSONS. OTHER PERSONALITIES. NOT A NICE NEAT MULTIPLE PERSONALITY TYPE THING, BUT SOME ASPECTS OF THAT, OF DISSOCIATIVE DISORDER. PERHAPS LIKE HIS SISTER HAD DESCRIBED WITH HER IMAGINARY PLAYMATE ONLY I GOT THE IDEA HE MAY HAVE TAKEN IT MUCH FURTHER AND HAD GONE OUT OF TOUCH WITH REALITY WITH IT AND MAYBE COULDN'T VOLUNTARILY SAY, OKAY, I DON'T WANT TO, NO LONGER WANT TO BE SHAZAM OR WHATEVER. MAYBE HE, IN FACT, GOT STUCK IN THOSE ROLES.

Q TELL THE JURY WHAT OTHER REASONS YOU USED OR RELIED UPON IN MAKING YOUR EVALUATION?

A YES. AFTER I ARRANGED THEN TO COME BACK AND REEVALUATE HIM AND I RETURNED IN ABOUT A MONTH AND JONATHAN SAID – I SAID, DO YOU REMEMBER ME AND HE SAID YEAH, I [Tr. 1902] THINK, I SAW YOU SOMEWHERE. AND I SAID, WHERE. WELL, PROBABLY IN A HOSPITAL. I THOUGHT WELL, MAYBE THIS IS JUST STILL MALINGERING, FAKING BAD. I DIDN'T KNOW WHY HE

WOULD SAY THAT. PLUS, I MIGHT ADD AND PARENTHETICALLY RIGHT NOW AS AN ASIDE, THERE WERE OTHER THINGS BY THIS POINT HAD LED ME TO THINK THAT HE WAS NOT JUST FAKING BAD COMPLETELY.

I SAID, WELL, DAMON – I MEAN, JONATHAN, DO YOU REMEMBER LAST WEEK YOU TALKED ABOUT DAMON AND THESE OTHER PEOPLE THAT YOU SAID THAT YOU WERE AND I DO A LOT OF HYPNOSIS AND I'VE DONE MANY TIMES WHERE I'VE GIVEN PEOPLE POST-HYPNOTIC SUGGESTIONS AND THEN WATCHED THEM ENGAGE IN AN ACTIVITY AND SAID WHY ARE YOU DOING THAT AND THEY HAVE A VERY PERPLEXED LOOK ON THEIR FACE AND I RECOGNIZED THAT. IN MY OPINION, THAT WAS THE SAME TYPE LOOK THAT JONATHAN GAVE ME, DAMON, MICHAEL. NO RECOLLECTION. AND I THOUGHT, WELL, IF HE, IN FACT, WAS IN A DISSOCIATED STATE THE FIRST TIME I SAW HIM, THEN MAYBE HE REALLY DOESN'T REMEMBER A THING ABOUT THAT. MAYBE HE CAN ONLY GET IN TOUCH WITH THESE MEMORIES IN A CERTAIN STATE. AND SO, I THEN DECIDED THAT SINCE I HAD SUSPECTED THE POSSIBILITY OF THIS, OF DISSOCIATION, I HAD BROUGHT ALONG A DISSOCIATION SCALE, BURNSTEIN AND PULLMAN (PHONETIC) DISSOCIATION SCALE IN WHICH THEY HAVE 28 AREAS AND YOU ASK THE PERSON HAVE THESE THINGS EVER HAPPENED TO YOU AND, IF SO, WHAT PERCENTAGE OF THE TIME WOULD YOU SAY THEY HAVE HAPPENED? AND OF 28 OF THESE [Tr. 1903] BEHAVIORS WHICH ARE KNOWN TO BE VERY FREQUENT BEHAVIORS

AMONG PERSONS WHO ARE DISSOCIATED INCLUDING MULTIPLE PERSONALITIES, HE RESPONDED THAT THEY OCCURRED AT LEAST 50 PERCENT OF THE TIME ON TWENTY OF THEM. NOW, I THOUGHT, WELL, MAYBE, ONCE AGAIN, WHY DID HE NOT DO IT ON ALL 28 IF HE WAS REALLY JUST FAKING BAD. WHY DID HE LEAVE OFF EIGHT OF THEM? WHY DID HE NOT SAY IT OCCURRED ON ALL OF THEM. AND THEN I ADDED UP HIS SCORE AND IT WAS MOST LIKE PERSONS WITH MULTIPLE PERSONALITY. IT WAS A HIGHER SCORE THAN SCHIZOPHRENICS OBTAIN ON THAT SCALE. IT WAS A HIGHER SCORE THAN TEEN-AGERS OBTAIN ON THAT SCALE AND TEEN-AGERS OFTEN REPORT DISSOCIATION NOW AND THEN. IT'S SORT OF NORMAL AMONG SOME TEEN-AGERS AND FAR HIGHER THAN NORMAL PERSONS.

SO, I WAS EVEN MORE CONVINCED NOW THAT SOME DISSOCIATED DISORDER WAS IN ACTION WITH THIS MAN.

Q SO, YOU ACTUALLY GAVE HIM A TEST THEN TO MEASURE DISSOCIATION OR TO DETERMINE WHETHER YOU THOUGHT HE DID HAVE DISSOCIATION?

A IT'S ONE OF THE ONLY VALIDATED DISSOCIATION SCALES AVAILABLE.

Q OKAY. DID YOU ALSO GIVE ANY SORT OF TESTS OR QUESTIONNAIRES TO ANYBODY ELSE?

A YES, SIR. AT THAT POINT, I DECIDED WELL, LET'S SEE IF HIS FAMILY MEMBERS OR PEOPLE WHO

HAVE KNOWN HIM WELL OBSERVED ANY OF THESE BEHAVIORS. SO, I CONSTRUCTED A SCALE [Tr. 1904] OF, I BELIEVE, IT WAS TWENTY ITEMS AND OF THE TWENTY ITEMS, I INTERSPERSED THEM. LIKE ODD NUMBERS WOULD BE ONES THAT MIGHT NOT BE RELATED TO DISSOCIATION, BUT THEY WOULDN'T BE GOOD TO SAY THAT YOU DID THEM AND THE EVEN NUMBERS HAD TO DO WITH DISSOCIATION AND I GAVE ONE TO HIS MOTHER AND ONE TO HIS SISTER, ROBIN.

NOW, WHEN THEY CAME BACK, ALTHOUGH THEY HAD RATED HIM AS ENGAGING IN A LOT OF THESE BEHAVIORS, THE PREDOMINANCE WAS TOWARD THE EVEN NUMBERS, THE ONES THAT HAD TO DO WITH DISSOCIATION LIKE SITTING AND STARING INTO SPACE, SEEMING TO ACT AS IF HE WAS SOMEBODY ELSE, TELLING WHAT THEY KNEW WERE LIES BUT IN A WAY THAT IT SEEMED TO THEM THAT HE THOUGHT HE REALLY WAS TELLING THE TRUTH. THEY ENDORSED THESE AS OCCURRING VERY OFTEN. ONE OR THE OTHER ENDORSED EACH OF THOSE AS OCCURRING VERY OFTEN AND THE OTHER ONE AS VERY – AS FREQUENTLY, NOT – NOT EXTREMELY OFTEN, BUT FREQUENTLY. AND THEY ENDORSED THAT MORE THAN MOST – THOSE TYPE ITEMS MORE THAN MOST ARE THE ITEMS THAT HAD TO DO WITH OTHER UNDESIRABLE BEHAVIORS BUT NOT RELATED TO DISSOCIATION.

Q OKAY. YOU'VE MENTIONED ALSO THAT WHEN YOU WENT BACK FROM THE FIRST VISIT

THAT HE COULDN'T RECALL THE PEOPLE HE MENTIONED MIKE AND PHILLIP AND THAT SORT OF THING –

A YES, SIR –

Q – WOULD THAT HAVE BEEN A REASON THAT YOU USED TO [Tr. 1905] DRAW YOUR CONCLUSION?

A YES, SIR, BECAUSE I FELT HE WAS IN A DIFFERENT STATE. THEN WENT [sic] I WENT BACK THE THIRD TIME TO – JUST TO GET A GENERAL IDEA OF HIS – WHETHER HE WAS RATIONAL OR NOT THAT SO A PARALEGAL COULD ADMINISTER THE M. M. P. I. TO HIM, READ THE M. M. P. I. QUESTIONS TO HIM. HE, AGAIN, SAID HE HAD NO RECOLLECTION OF DAMON OR ANY OF THESE PEOPLE. AND ONCE AGAIN, GAVE ME THAT LOOK OF WHAT ARE YOU TALKING ABOUT.

Q ALL RIGHT. LET ME ASK YOU, YOU MENTIONED THE M. M. P. I. ARE YOU FAMILIAR WITH HIM TAKING – OR TELL ME WHAT AN M. M. P. I. IS, FIRST?

A AN M. M.P.I. IS A MINNESOTA MULTI-PHASIC PERSONALITY INVENTORY. IT'S THE MOST POPULAR, THE MOST COMMONLY GIVEN TEST OF PERSONALITY AND IT REQUIRES YOU TO ANSWER 584 QUESTIONS IN A YES OR NO FASHION AND AS A RESULT OF YOUR ANSWERS, YOU CAN BE RATED AS TO WHETHER YOU SCORE LIKE PEOPLE DIAGNOSED AS SCHIZOPHRENIC OR DEPRESSED OR SOCIOPATHIC AND DIFFERENT TYPES OF PSYCHIATRIC CATEGORIES. AND HE HAD BEEN ADMINISTERED

THIS TEST AT HALL, I BELIEVE – AT THE STATE HOSPITAL –

Q ALL RIGHT. WHERE IS HALL?

A HALL PSYCHIATRIC INSTITUTE OR THE STATE HOSPITAL, I'M NOT –

Q THE STATE HOSPITAL.

[Tr. 1906] A THE STATE HOSPITAL AND –

Q WHEN HAD THAT TEST BEEN GIVEN, DO YOU REMEMBER?

A I DON'T REMEMBER WHEN IT WAS GIVEN.

Q OKAY.

A BUT THEY HAD FELT THAT IT WAS – HE WAS JUST ALL OVER THE PLACE WITH IT AND THAT HE HADN'T REALLY TRIED AND HE HAD BEEN ELEVATED – WHAT WE CALL ELEVATED ON SEVERAL AREAS, MEANING THAT HE HAD SCORED ABNORMALLY IN FIVE OR SIX AREAS. LIKE DEPRESSION AND A BUNCH OF THE AREAS THAT DON'T REALLY MEAN NECESSARILY BECAUSE HE'S HIGH ON DEPRESSION, THAT HE IS DEPRESSED BUT IT'S IN THE DIRECTION OF DEPRESSION. HE HAD SCORED HIGH ON SEVERAL OF THEM. THIS CAUSED THEM TO FEEL THAT IT PROBABLY WAS INVALID.

WHEN IT WAS RE-ADMINISTERED BY THE PARALEGAL, HE DID THE SAME THING. HE SCORED HIGH ON MOST ALL THE SAME ONES THAT HE HAD SCORED HIGH ON BEFORE. AND WE HAD A COMPUTER SCORE AND THE ONE INTERPRETATION WAS

FAKING BAD. THAT HE WAS PERHAPS MALINGERING AGAIN. THAT HE JUST WANTED US TO THINK HE WAS BAD IN EVERYTHING AND HAD MANY PROBLEMS, BUT – YOU KNOW, THAT'S A POSSIBILITY BUT BY THAT POINT IN TIME, WHEN HE WAS DOING THE OTHER QUESTIONS, ANSWERING OTHER QUESTIONS FOR ME, HE NO LONGER APPEARED TO BE FAKING BAD, SO, I HAVE A REASON TO BELIEVE THAT HE DID, IN FACT, HONESTLY REPORT MANY, MANY SYMPTOMS OF DIFFERENT PSYCHIATRIC TYPE CATEGORIES AND THAT'S NOT UNUSUAL AMONG [Tr. 1907] PEOPLE WHO HAVE A DISSOCIATIVE DISORDER. AS A MATTER OF FACT, THAT'S COMMON AMONG PEOPLE WHO HAVE A DISSOCIATIVE DISORDER. THEY SOMETIMES – THEY'RE DEPRESSED OVER THEIR CONDITION. THEY SOMETIMES FEEL LIKE SOMEONE ELSE IS TALKING TO THEM AND THEY HEAR VOICES. IT MAY JUST BE ANOTHER ASPECT OF THEIR PERSONALITY TALKING TO THEM BUT THEY THINK IT'S AN OUTSIDE FORCE AND THAT SCORES YOU TOWARDS SCHIZOPHRENIA ON THE M. M. P. I. IT'S NOT UNUSUAL, IN OTHER WORDS, FOR YOU TO HAVE A LOT OF WHAT WE CALL ELEVATED SCALES OR HIGH SCORES ON THAT IF YOU HAVE A DISSOCIATION DISORDER. IT'S ALSO NOT UNUSUAL IF YOU'RE TRYING TO FAKE BAD, BUT I HAPPEN TO BELIEVE THAT IN HIS CASE, IT WAS PRIMARILY THE DISSOCIATIVE ORDER THAT WAS LEADING TO THAT.

Q DOCTOR, YOU'VE HAD A CHANCE TO REVIEW THE I.Q. TEST THAT HE HAD BEEN GIVEN IN THE PAST OR THE RESULTS OF THOSE TESTS. I

THINK, YOU ALSO GAVE HIM AN I.Q. TEST, TOO, DIDN'T YOU?

A YES, SIR, I DID.

Q DID THIS HAVE ANY BEARING ON YOUR DIAGNOSIS OR FACTOR INTO YOUR REASONS FOR DIAGNOSING JONATHAN SIMMONS AS HAVING A DISSOCIATIVE DISORDER?

A WELL, ONLY IN THE SENSE THAT, I THINK, I OBTAINED AN I.Q. IN THE 60'S AND HE'S HAD THEM IN THE 70'S AND HE'S HAD THEM AS HIGH AS 80 AND THAT'S A LITTLE WIDER VARIATION THAN [Tr. 1908] ONE WOULD EXPECT BY ERROR ALONE, BY ERROR OF THE TEST AND IT WOULD BE COMMENSURATE WITH SOMEONE WHO WAS IN DIFFERENT STATES OF MIND WHEN THEY WERE TAKING THE TEST.

Q LET ME ASK YOU, WHERE DID HE SCORE IN YOUR OPINION AND – HOW HAVE YOU GIVEN I.Q. TESTS IN THE PAST?

A YES, SIR.

Q HOW MANY I.Q. TESTS HAVE YOU GIVEN WOULD YOU ESTIMATE?

A TWO THOUSAND.

Q OKAY. AND WHERE – BASED ON YOUR GIVING THE I.Q. TEST AND YOUR REVIEW OF JONATHAN SIMMONS, HOW WOULD YOU RATE HIS INTELLIGENCE?

A I BELIEVE, AT THE PRESENT HE'S FUNCTIONING IN THAT BORDERLINE CATEGORY.

Q WHAT DO YOU MEAN BORDERLINE?

A IN THE – THEY CALL IT BORDERLINE BECAUSE IT'S BORDERLINE BETWEEN RETARDATION AND NORMALCY. ANYTHING ABOVE 80 IS CONSIDERED WITHIN THE SLOW NORMAL AND AS YOU GET CLOSER TO ONE HUNDRED, IT'S COMPLETELY AVERAGE. BELOW 70 IS GENERALLY CONSIDERED MENTAL RETARDATION. AND, SO, THEY JUST HAVE THE 70'S AS CALLING A BORDERLINE. IT'S HARD TO SAY, YOU KNOW, IT'S LIKE IS THE CUP HALF FULL OR HALF EMPTY? IS HE NEARLY NORMAL OR IS HE NEARLY RETARDED. BORDERLINE.

Q DOCTOR, IN YOUR PROFESSIONAL OPINION, SOMEBODY WHO [Tr. 1909] SCORES IN THAT RANGE ON AN I.Q. TEST, COULD THEY ACTUALLY FAKE THE RESULTS OF A MENTAL DISORDER?

A THEY COULD ATTEMPT TO FAKE IT AND, I THINK, HE WAS ATTEMPTING TO FAKE IT WHEN HE WAS AT THE STATE HOSPITAL AND PERHAPS WHEN HE FIRST – WHEN I FIRST SAW HIM. AND THE THINGS THAT HE WOULD ATTEMPT TO FAKE WERE CORRECT, TRANSPARENT, LIKE RED, WHITE AND ORANGE. AND IT WAS LIKE HE KNEW WHAT IT WAS BUT HE DIDN'T WANT ME TO THINK HE KNEW IT. BUT WHEN YOU GET DOWN TO SOME OTHER ASPECTS OF IT, NO. FOR EXAMPLE, LATER THAT DAY, I GAVE HIM THE ONE CALLED THE TRAIL MAKING TEST AND THIS REQUIRES YOU TO BASICALLY INTERCONNECT DOTS. YOU'D GO FROM ONE TO TWO TO THREE TO FOUR AND THEN ON THE SECOND ONE, YOU'D GO ONE TO "A", TWO TO "B",

THREE TO "C", FOUR TO "D". IT WAS LIKE CONNECT THE DOTS OR CONNECT THE CIRCLES. AND HE DID VERY WELL ON THE FIRST ONE AND THEN HE COULDN'T DO THE SECOND ONE AT ALL. AND THAT – I DON'T THINK HE WOULD HAVE BEEN SMART ENOUGH IN THAT SENSE TO FAKE AND SAY, WELL, I'M GOING TO REALLY THROW THIS GUY OFF AND I'M GOING TO DO THE FIRST ONE BECAUSE IT'S EASY AND HE'LL – I'LL JUST FAIL THE SECOND ONE AND HE'LL THINK I'M BRAIN DAMAGED AND I DON'T THINK HE COULD.

Q WHAT ABOUT HIS SOCIAL HISTORY, HIS BACKGROUND, WOULD THAT BE COMMENSURATE WITH SOMEBODY HAVING A DISSOCIATIVE DISORDER?

[Tr. 1910] A OH, YES.

Q. TELL ME WHAT FACTORS YOU WOULD CONSIDER TO BE CONSISTENT WITH A DISSOCIATE DISORDERS?

A MOST PEOPLE TODAY THINK OF – WHEN THEY THINK OF A DISSOCIATIVE DISORDER, THEY ARE THINKING OF MULTIPLE PERSONALITY WHICH IS THE EXTREME CASE OF IT. BUT THERE ARE OTHER TYPES OF DISSOCIATIVE DISORDER. AND JONATHAN HAD SORT OF A MIXTURE. THAT'S WHY I CALLED IT NONSPECIFIC. BUT IN ALL CASES, THE MOST ACCEPTED THEORY AS TO WHY THESE DEVELOPED IS THAT THEY ARE NECESSARY TO ESCAPE PSYCHOLOGICALLY AND OR PHYSICALLY TOO PAINFUL A LIFE. SOME SITUATION IN YOUR LIFE AND ONE OF THE MOST COMMON ONES IS

PHYSICAL ABUSE. SEVERE PHYSICAL ABUSE. THE BEATINGS. SEVERE BEATINGS. ONE CAN GET INTO A DISSOCIATIVE STATE WHERE THEY MIGHT NOT EVEN FEEL THE PAIN ANYMORE OF THE BEATINGS AND THEN, A SECOND ONE THAT IS IMPLICATED IN A GREAT MANY CASES, A FEMALE MULTIPLE PERSONALITY IS SEXUAL ABUSE WHERE THEY CAN ACTUALLY – TO ESCAPE THE PSYCHOLOGICAL PAIN OF THIS – WHAT'S HAPPENING TO THEM GO INTO A – IT'S LIKE THEY LEARN TO GO INTO A TRANCE AND THAT TRANCE IS A DISSOCIATED STATE WHERE THEY CAN LATER PERHAPS NOT REMEMBER OR JUST REMEMBER VAGUELY WHERE THEY CAN ACTUALLY, SOME OF THEM REPORT THEY HAVE ACTUALLY FELT THEY FLOATED OUT OF THEIR BODY AND WATCHED SOMEONE ELSE BEING SEXUALLY ABUSED. AND SO, THE EVENTS REPORTED EARLIER, SOME [Tr. 1911] OF THEM WITH STRONG SUPPORT, SOME OF THEM ALLEGED, CERTAINLY WOULD BE OF THE TYPE WHICH WOULD LEAD ONE TO HAVE A DISSOCIATIVE DISORDER. I MEAN, THAT'S ONE LIKELY OUTCOME. IF YOU'RE GIVEN THE DISSOCIATIVE DISORDER FIRST, THEN THE ODDS ARE VERY GREAT THAT ONE OF THOSE THINGS OCCURRED IN THEIR BACKGROUND.

Q LET ME ASK YOU IF YOU PERFORMED WHAT'S CALLED A RORSCHACH TEST?

A YES, I DID.

Q TELL THE JURY WHAT A RORSCHACH TEST IS.

A A RORSCHACH TEST IS – YOU KNOW IS THE INK-BLOT TEST. I MEAN, EVERYONE HAS SEEN THE INK-BLOT TEST AND YOU LOOK AT THESE BLOTS OF INK WHICH REALLY ARE NOTHING BUT BLOTS OF INK. IT'S LIKE LOOKING AT THE CLOUDS. THEY'RE REALLY JUST CLOUDS. BUT YOU ALL HAVE DONE THIS WHERE YOU WOULD SAY, WELL, GEE, I SEE A RABBIT UP THERE OR A RHINOCEROS OR SOMETHING AND THE IDEA IS THAT IF IT'S JUST A CLOUD OR JUST AN INK BLOT, THEN WHAT YOU SEE MUST BE A PROJECTION FOR YOUR PERSONALITY. YOU MUST HAVE PROJECTED PART OF YOUR PERSONALTIY OUT INTO IT. SO, IT'S CALLED PROJECTIVE TECHNIQUE.

NOW, IN LOOKING AT THESE INK BLOTS, JONATHAN GAVE SOME VERY BIZARRE RESPONSES MANY OF WHICH DID NOT LOOK ANYTHING LIKE THE BLOT. FOR EXAMPLE, ANGEL OF DEATH. THIS DIDN'T – YOU'RE NOT GOING TO SEE ANGEL OF DEATH ON [Tr. 1912] THERE, NOBODY KNOWS WHAT AN ANGEL OF DEATH LOOKS LIKE. BUT THIS IS – INDICATES TO ME THAT HE WAS PREOCCUPIED WITH SUCH THEMES. I COULD READ A FEW OF THOSE IF IT'S PERMISSIBLE.

Q GO AHEAD.

A ANGEL OF DARKNESS, SPIRIT OF PAIN AND CRUELTY, SHIELD OF TERROR, EVIL BAT, DEMON, VIPER WITH TEETH, DEMONIC FORM –

Q DR. EVANS, WHAT – LET ME ASK YOU THIS BEFORE WE GO INTO THAT. TELL ME HOW YOU

EVALUATED THESE RESPONSES WITH JONATHAN SIMMONS.

A FIRST OF ALL, THEY WERE A GROSS DISTORTION OF REALITY BECAUSE AS I SAID, THOSE BLOTS, YOU KNOW, MOST PEOPLE SEE RABBITS AND BATS AND NOT DEMONIC BATS AND BUTTERFLIES AND THIS SORT OF THING IN THE PEOPLE. SO, HE WAS GROSSLY DISTORTING. IT.

I – TO ME, I INTERPRETED IT AS HE'S PREOCCUPIED WITH FORCES OF EVIL, FEAR OF FORCES IN HIS ENVIRONMENT, FEAR OF EVIL FORCES IN HIS ENVIRONMENT. THERE WERE – THERE WAS ONE CARD WHICH COMMONLY ELICITS THEMES OF WOMEN OF FEMININITY, MOTHER FIGURES. WOMEN IN GENERAL. WE KNOW THAT BECAUSE COLLEGE STUDENTS HAVE TAKEN IT AND THE NUMBER OF RESPONSES THAT ARE LITTLE GIRLS HERE OR WOMEN WITH PONYTAILS OR WHATEVER. THESE ARE VERY COMMON TYPE RESPONSES.

[Tr. 1913] JONATHAN'S RESPONSE THE FIRST TIME – BY THE WAY, I GAVE SOME OF THESE TESTS TWICE AS A DOUBLE CHECK ON IT. THE FIRST TIME HE SAID LOOKS NICE BUT TRANSFORMS ITSELF INTO A FOUR-LEGGED BEAST. AND THE SECOND TIME ON THAT CARD HE SAID A VIPER WITH TEETH AND FANGS IS EVIL, VERY EVIL.

IN MY OPINION, THAT'S COMMENSURATE WITH STATEMENTS THAT WE HEARD EARLIER THAT HIS – SOMEONE IN HIS FAMILY, WE HEARD EARLIER THE GRANDMOTHER HAD ABUSED HIM AND THREATEN

[sic] DIRE CONSEQUENCES, EVIL CONSEQUENCES, SHOULD HE TELL.

Q HOW MANY OF THESE TESTS WOULD YOU ESTIMATE YOU HAVE PERFORMED?

A AROUND THREE THOUSAND.

Q HOW LONG HAVE YOU BEEN GIVING THEM?

A SINCE 1962.

Q DO YOU FIND THEM TO BE RELIABLE OR LET ME ASK YOU, INSTEAD OF YOU YOURSELF PERSONALLY, ARE THEY CONSIDERED IN YOUR PROFESSION TO BE RELIABLE?

A THEY ARE CONSIDERED BY MANY PSYCHOLOGISTS TO BE RELIABLE AND, I THINK, THE BEST EVIDENCE FOR THAT IS THEY WITHSTOOD THE TEST OF TIME. THEY ARE STILL VERY FREQUENTLY USED DESPITE THE FACT THEY'VE BEEN AROUND SINCE THE 1920'S AND HAVE BEEN SEVERELY CRITICIZED MANY TIMES. SO, NO – NOT EVERYONE AGREES THAT THEY ARE RELIABLE. I DO.

[Tr. 1914] Q DID YOU HAVE A CHANCE TO REVIEW JONATHAN SIMMONS' JOB HISTORY?

A YES, I DID.

Q AND WHAT DID THAT REFLECT?

A THAT HE WAS VERY ERRATIC IN HIS JOB PERFORMANCES.

Q ALL RIGHT. AND YOU'VE HEARD TESTIMONY TODAY AND HAVE YOU HAD A CHANCE TO

REVIEW ALSO HIS LACK OF MEMORY FOR CERTAIN EVENTS?

A YES, SIR. THAT WAS PART OF THAT QUESTIONNAIRE THAT THE MOTHER AND THE SISTER BOTH AGREED THAT HE HAD MANY LAPSES OF MEMORY. HE TOLD ME HE HAD LAPSES OF MEMORY. HE TOLD – APPARENTLY, I – AS I RECALL, HE TOLD PEOPLE IN THE PRISON THAT HE HAD HAD LAPSES OF MEMORY. FOR EXAMPLE, HE TOLD ME HE HAD NO MEMORY WHATSOEVER OF TRYING TO HANG HIMSELF OR OF TRYING TO SET HIMSELF ON FIRE OR ACTUALLY SETTING HIMSELF ON FIRE, I BELIEVE.

Q OKAY. AND WOULD THAT BE – LEND CIRCUMSTANTIAL SUPPORT FOR YOU CONCLUSION THAT HE HAS A DISSOCIATIVE DISORDER?

A YES, SIR, IT WOULD.

Q WHAT WOULD THE EFFECT OF ALCOHOL OR DRUGS BE UPON SOMEONE WHO HAD A DISSOCIATIVE DISORDER?

A IT IS NOW WIDELY AGREED THAT DRUGS AND ALCOHOL CAN FACILITATE A DISSOCIATIVE STATE. THAT WHEN YOU INGEST IT, YOU ARE MORE APT TO – THAT'S LIKELY TO KICK OFF ONE OF [Tr. 1915] THESE DISSOCIATE STATES.

Q DOCTOR, YOU HAVE MENTIONED MALINGERING AND YOU SAID YOU THOUGHT JONATHAN SIMMONS WAS MALINGERING SOME, IS THAT CORRECT?

A I THINK HE WAS THE FIRST TIME I SAW HIM, ESPECIALLY.

Q IS IT POSSIBLE FOR SOMEONE TO BE MALINGERING AND ALSO HAVE A MENTAL ILLNESS AT THE SAME TIME?

A YES, SIR, IT CERTAINLY WOULD BE. I THINK I HAVE MENTIONED THIS DIFFERENT TIMES THAT WE ARE ALL FAMILIAR WITH THE – WELL, I GUESS THE MOST COMMON ONE IS A CHILD WHO MIGHT HAVE A TEMPERATURE OF 103 BUT PUTS THE THERMOMETER NEAR THE OVEN SO THAT IT LOOKS LIKE IT'S 108 AND HE'LL GET OUT OF SCHOOL.

Q DR. EVANS, SUMMARIZE IF YOU WOULD FOR THE JURY WHAT THE CAUSES ARE OF A DISSOCIATIVE DISORDER?

A ONE OF THE MOST FREQUENTLY ACCEPTED CAUSES, THE VAST MAJORITY OF DISSOCIATIVE DISORDERS OF THE SEVERE TYPE OF LIKE MULTIPLE PERSONALITY AND THE OTHERS AS WELL, I BELIEVE, TO BE CAUSED BY EXTREME PHYSICAL OR SEXUAL ABUSE DURING CHILDHOOD WHICH IS TOO PAINFUL FOR THE MIND TO ACCEPT, WHICH FACILITATES THE PERSON DEVELOPING A HABITUAL MODE OF DEFENSE OF GOING INTO A SORT OF A TRANCE, HYPNOTIC-LIKE TRANCE, SELF-HYPNOSIS-LIKE TRANCE AND AS A RESULT OF BEING ABLE TO THINK IT'S HAPPENING TO SOMEBODY ELSE, FORGET PARTS OF IT OR IN OTHER WORDS, DISSOCIATE AND [Tr. 1916] NOT HAVE THAT UNITY OR THAT INTEGRATION THAT MOST OF US HAVE WHERE WE RECOGNIZE WHICH IS WHAT'S REALLY

OUR THOUGHTS OR OUR BEHAVIORS, NOW WHERE DID IT COME FROM SORT OF THING.

Q HOW DOES THE NONSPECIFIC DISSOCIATIVE DISORDER AFFECT JONATHAN SIMMONS?

A IN MY IN [sic] OPINION –

Q IN YOUR OPINION.

A – IN MY OPINION –

Q BASED ON YOUR THIRTY YEARS IN PSYCHOLOGY AND YOUR REVIEW OF THE RECORDS IN THIS CASE, TELL ME YOUR OPINION.

A IN MY OPINION, JONATHAN WAS SEVERELY PHYSICALLY ABUSED AND BASED ON THESE RORSCHACH RESULTS AND THE OTHER TESTIMONY WE HAVE HEARD TODAY AND THAT I HAVE HEARD SOME EARLIER, I BELIEVE, ALSO SEXUALLY ABUSED AND THIS WAS SO EXTREME THAT HE LEARNED TO DISSOCIATE AND THAT HE IN THESE DISSOCIATIVE STATES, HE MIGHT ENGAGE IN BEHAVIORS WHICH DIDN'T SEEM TO HIM THAT HE WAS DOING AND THEN HE MIGHT HAVE AMNESIA FOR THEM AFTERWARDS AND IT WOULD SEEM VERY LOGICAL THAT IF HE HAD BEEN PHYSICALLY ABUSED BY HIS FATHER, THAT IT WOULD BE ALMOST IMPOSSIBLE TO ESCAPE FEELINGS OF EXTREME HATRED AND ANGER TOWARD YOUR FATHER AND WANTING TO DESTROY SOME OF THE THINGS YOUR FATHER HELD AND VALUED LIKE HIS CAMPER AND SO ON. AND THAT HE WOULD ALSO COME TO HATE WOMEN, PERHAPS ESPECIALLY OLDER WOMEN. AND IF THIS WAS SOMETHING THAT HE WOULD

NOT REGULARLY, ORDINARILY DO BUT [Tr. 1917] FLIPPED INTO A DISSOCIATIVE STATE IN WHICH IT DIDN'T SEEM LIKE HE WAS REALLY DOING IT, IN WHICH HE COULD HAVE AMNESIA FOR AFTERWARD, IT WOULDN'T SURPRISE ME AND IT IS MY OPINION, THAT'S THE SORT OF STATE HE WAS IN WHEN HE SMASHED HIS FATHER'S CAMPER, KILLED THE FATHER'S TURTLE AND RAPED AND ALLEGEDLY, I GUESS I HAVE TO USE THE WORD ALLEGEDLY OR I'M NOT SURE, BUT WHATEVER WITH THESE WOMEN.

Q BEG THE COURT'S INDULGENCE ONE MOMENT, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. BUNCH: JUST A COUPLE MORE QUESTIONS, DR. EVANS. IN YOUR PROFESSIONAL OPINION, IS IT LIKELY THAT WHEN THE MURDER OF JOSIE LAMB WAS COMMITTED IN THIS CASE THAT JONATHAN SIMMONS WAS ACTING UNDER THE INFLUENCE OF A MENTAL OR EMOTIONAL DISTURBANCE?

A YES, IT'S MY OPINION THAT THAT'S LIKELY.

Q ALL RIGHT. AND IS IT YOUR – WOULD IT BE YOUR PROFESSIONAL OPINION OR DO YOU HAVE A PROFESSIONAL OPINION ON WHETHER THE CAPACITY OF JONATHAN SIMMONS TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED?

A YES, I AGREE WITH THAT, IF HE WAS IN A DISSOCIATIVE STATE, HE CERTAINLY WOULD NOT – MANY PEOPLE IN DISSOCIATIVE STATES WILL REPORT LIKE WITH THE MULTIPLES, THEY WILL REPORT LATER THAT PERSONALITY "A" WAS ENGAGING IN THIS BEHAVIOR AND I WAS WATCHING IT AND COULDN'T DO [Tr. 1918] ANYTHING TO STOP IT MUCH TO THEIR CHAGRIN AND, I THINK, THAT IT'S ENTIRELY POSSIBLE THAT THIS WAS HAPPENING WITH JONATHAN EVEN THOUGH I DON'T BELIEVE HE WAS IN A FULL BLOWN MULTIPLE.

Q OKAY. AND IS IT YOUR TESTIMONY THAT JONATHAN SIMMONS' REASONING IS IMPAIRED?

A YES, IT IS IN DISSOCIATIVE STATES AND IN GENERAL BECAUSE OF HIS LIMITED INTELLIGENCE.

Q OKAY. YOU ALSO PERFORMED SOME TESTS CONCERNING HIS MATHEMATICAL AND READING LEVELS, I BELIEVE?

A YES, SIR, I DID.

Q WOULD IT BE YOUR PROFESSIONAL OPINION THAT JONATHAN SIMMONS EITHER HAD A MENTAL OR AN EMOTIONAL DEVELOPMENT THAT WAS SIGNIFICANTLY BELOW THAT OF A PERSON OF HIS CHRONOLOGICAL AGE?

A AN EMOTIONAL DEVELOPMENT?

Q YES.

A I'M NOT SURE I RELATE THAT TO THE READING AND ARITHMETIC.

Q OH, I'M SORRY. MAYBE THEY ARE NOT RELATED, BUT JUST IN GENERAL BASED ON YOUR PROFESSIONAL EXPERIENCES, WOULD HIS EMOTIONAL DEVELOPMENT BE LESS THAN THAT OF SOMEBODY IN THE SAME CHRONOLOGICAL AGE?

A YES, SIR. USUALLY THERE IS A – WHEN SOMEONE'S DELAYED IN THEIR INTELLIGENCE, THERE IS USUALLY SOME [Tr. 1919] GENERAL DEVELOPMENTAL DELAY WHICH WOULD HAVE INCLUDED THE EMOTIONAL ASPECTS AS WELL AS SOCIAL ASPECTS AND ALL ASPECTS OF DEVELOPMENT.

Q ANSWER ANY QUESTION MR. HARPOOTLIAN MAY HAVE, DOCTOR.

CROSS EXAMINATION BY MR. HARPOOTLIAN:

* * *

[Tr. 1931] Q DOES HE HAVE – IS HE MEAN? IN YOUR – IS THIS – MAYBE THAT'S TOO SIMPLE A DIAGNOSIS. IS HE A MEAN GUY?

A MEAN?

Q YEAH, MEAN. WILL HE HURT PEOPLE IN YOUR PROFESSIONAL OPINION?

A I DIDN'T FEEL UNSAFE WITH HIM OR IN FEAR.

Q NO, SIR, IF YOU WOULD ANSWER THE QUESTION YES OR NO AND THEN YOU CAN EXPLAIN WHETHER YOU FEEL UNSAFE WITH HIM OR NOT. IS HE A DANGEROUS AND MEAN PERSON?

A I THINK THAT HE'S DANGEROUS AND A DANGEROUS PERSON AS LONG AS HE GOES INTO DISSOCIATIVE STATES, YES SIR, OF [Tr. 1932] COURSE.

Q SO, THE ANSWER IS YES, HE IS A DANGEROUS PERSON?

A YES, SIR.

Q THANK YOU.

* * *

[Tr. 1959] THE WITNESS: SUSAN PERRY, P-E-R-R-Y.

DIRECT EXAMINATION BY MR. BUNCH:

Q MS. PERRY, TELL THE JURY WHERE YOU ARE EMPLOYED?

A RICHLAND COUNTY DETENTION CENTER.

Q AND I WHAT CAPACITY?

A MEDICAL ASSISTANT.

Q WHAT DO YOU DO AS A MEDICAL ASSISTANT?

A I ASSIST DURING SICK CALL WITH THE DOCTORS AND, WITHOUT THE PHYSICIANS, ACT AS LIAISON BETWEEN THE DETENTION CENTER AND COLUMBIA AREA MENTAL HEALTH.

Q ALL RIGHT. AND IN THAT CAPACITY, HAVE YOU COME TO KNOW JONATHAN SIMMONS?

A YES, SIR, I HAVE.

Q HOW LONG HAVE YOU KNOWN JONATHAN SIMMONS?

[Tr. 1960] A SINCE THE DAY OF HIS INCARCERATION.

Q JULY 18, 1990?

A UH-HUH.

Q HAVE YOU HAD - HOW MANY TIMES HAVE YOU HAD A CHANCE TO SEE JONATHAN OVER THE LASE YEAR? ANY TYPE OF ESTIMATE THAT YOU MIGHT HAVE ON THAT OR HOW REGULARLY DO YOU SEE JONATHAN MAYBE THAT'S A BETTER WAY TO ASK THE QUESTION?

A I SEE HIM THROUGHOUT THE FACILITY ON A DAILY BASIS. I SEE HIM DIRECTLY, HIM AND I OR HIM AND I AND MEDICAL PERSONNEL, I GUESS, SINCE HIS INCARCERATION, APPROXIMATELY ONE HUNDRED TIMES.

Q OKAY. AND WHEN YOU SAY YOU SEE HIM THROUGHOUT THE FACILITY, ARE YOU ACTUALLY GOING INTO THE PRISON AREA ITSELF?

A YES, SIR.

Q ALL RIGHT. AND THEN THERE ARE OTHER OCCASIONS WHEN HE COMES INTO THE, I GUESS, YOU'D CALL IT THE DOCTORS OFFICE?

A YES, SIR.

Q WHAT TYPE OF INMATE HAS HE BEEN AT THE RICHLAND COUNTY DETENTION CENTER?

A UH –

Q IN TERMS OF HIS ADAPTING TO PRISON LIFE AND GETTING ALONG WITH THE PERSONNEL THERE?

A SINCE HE – SINCE HIS ARREST, THERE WAS A PERIOD THAT HE WENT THROUGH WHERE HE DID NOT INTERACT AT ALL. HE HAS [Tr. 1961] OVERCOME THAT PERIOD AND HE INTERACTS WELL WITH EVERYONE, BOTH OFFICERS, ANY PERSONNEL, AS WELL AS HIS CELL MATES BOTH IN THE FACILITY AN ON THE REC YARD.

Q ALL RIGHT. HAVE YOU BEEN WITH HIM ALONE IN THE PRISON?

A YES, SIR.

Q AND IN THOSE CIRCUMSTANCES HAS HE BEEN SHACKLED?

A NO, SIR.

Q HAS HE BEEN RESTRAINED IN ANY WAY?

A NO, SIR.

Q HAVE YOU TRUSTED HIM ON THOSE OCCASIONS?

A YES, SIR.

Q HAVE YOU EVER HAD A TIME WHEN YOU DIDN'T TRUST HIM?

A NO, SIR.

Q HAS HE SHOWN THE ABILITY TO REHABILITATE IN PRISON?

A YES, SIR.

Q HAS HE ADAPTED TO PRISON LIFE?

A YES, SIR.

Q NO FURTHER QUESTIONS.

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[Tr. 1974] MR. BUNCH: THANK YOU, YOUR HONOR. LADIES AND GENTLEMEN OF THE JURY, TWO WITNESSES ARE NOT AVAILABLE THAT WERE TO TESTIFY IN THIS CASE. AS RESULT, THE STATE AND THE DEFENSE HAVE AGREED UPON A STIPULATION. THAT STIPULATIONS IS AS A [sic] FOLLOWS. THE STATE HAS STIPULATED THAT THE DEFENSE COULD PRESENT TWO ADDITIONAL WITNESSES LIEUTENANT ALTON AND SERGEANT HIGGINS WHO WOULD TESTIFY THAT JONATHAN DALE SIMMONS HAS ADAPTED WELL TO PRISON LIFE AND THESE OFFICERS HAVE DIRECT KNOWLEDGE OF THIS MATTER. [Tr. 1975] LIEUTENANT ALTON AND SERGEANT HIGGINS ARE SUPERVISORS AT THE RICHLAND COUNTY DETENTION CENTER.

THE COURT: THANK YOU.

THE STATE?

THE SOLICITOR: DOES THE DEFENSE REST [sic], YOUR HONOR?

THE COURT: I BELIEVE THAT IS CORRECT.

MRS. SHEALY: THE DEFENSE HAS RESTED.

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[Tr. 2037] THE SOLICITOR: YOUR HONOR, AS TO REQUEST TO CHARGE G, I'M SURE YOU HAVE A CHARGE THAT ADDRESSES THIS [Tr. 2038] ALREADY.

THE COURT: G, OF COURSE, COMES WITHIN THE DECISION I HAVE HERETOFORE MADE IN REGARD TO THE MEANING OF THESE TERMS. I'M GOING TO HANDLE IT IN MY FASHION. YOU LAWYERS ARE NOT TO DISCUSS PAROLE OR THE MEANING OF THOSE WORDS. WE JUST USE THEM IN THEIR ORDINARY SENSE IN YOUR PRESENTATION. IF THERE IS A JURY QUERY IN THAT REGARD, I'M READY TO RESPOND UNDER MY PRIOR RULING.

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[Tr. 2051] THE SOLICITOR: PLEASE THE COURT, YOUR HONOR? MR. FOREMAN, LADIES AND GENTLEMEN, THIS WILL BE THE LAST OPPORTUNITY I HAVE TO PRESENT ANYTHING TO YOU IN THIS TRIAL. AND THAT MAY COME AS A WELCOMED RELIEF TO SOME OF YOU. IT HAS BEEN ALMOST A WEEK SINCE WE MET, SOME OF US LAST MONDAY MORNING BEGAN THE PROCESS OF SELECTING THIS JURY AND AS YOU TOOK THIS WITNESS STAND, YOU WERE ASKED TO PUT YOUR HAND ON THIS BIBLE AND YOU WERE ASKED TO TELL THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH.

NOW, AT THIS STAGE OF THE PROCEEDINGS, THE INNOCENCE OR GUILT OF THE DEFENDANT, JONATHAN SIMMONS, IS NO LONGER AN ISSUE. YOU, AS A COLLECTIVE BODY, HAVE FOUND BEYOND A REASONABLE DOUBT AND TO THE

DEGREE YOU RELIED ON CIRCUMSTANTIAL EVIDENCE TO A MORAL CERTAINTY THAT HE MURDERED JOSIE LAMB AND HE COMMITTED THE CRIMES OF BURGLARY AND LARCENY. THE ISSUE THAT WE CONFRONT THIS MORNING IS IN SOME WAYS EASIER AND SOME WAYS HARDER TO RESOLVE THAN THE ISSUE YOU CONFRONTED LAST THURSDAY. I WANT TO TALK TO YOU FOR A MOMENT ABOUT THAT DECISION IN GENERAL TERMS AND THEN [Tr. 2052] I WANT TO TALK TO YOU ABOUT THE SPECIFIC DECISION IN THIS CASE.

FIRST OF ALL, THE DEATH PENALTY. EACH ONE OF YOU PUT YOUR HAND ON THIS BIBLE AND UNDER OATH TOOK THIS WITNESS STAND AND WAS ASKED THIS QUESTION, IN THE PROPER CASE OR IF THE CIRCUMSTANCES ARE PROPER, COULD YOU SENTENCE SOMEONE TO DEATH. MORE, SPECIFICALLY, EACH AND EVERY ONE OF YOU WERE ASKED COULD YOU SIGN YOUR NAME TO THE VERDICT FORM IN THIS CASE, THE DEATH VERDICT, SENTENCING SOMEONE TO DEATH AND THE ANSWER WAS YES. SO, THE ISSUE OF THE MORALITY OR IMMORALITY, THE RIGHTNESS OR WRONGNESS OF THE DEATH PENALTY IS NOT BEFORE US THIS MORNING. BECAUSE EACH AND EVERY ONE OF YOU HAVE ALREADY AGREED THAT IT IS APPROPRIATE IN SOME CIRCUMSTANCES. SO, WE NEXT COME TO WHAT ARE THOSE CIRCUMSTANCES. I WOULD AGREE THAT THERE ARE MANY INSTANCES UNDER WHICH YOUR DECISION, MANY CIRCUMSTANCES AND MANY CASES UNDER WHICH YOUR DECISION WOULD BE DIFFICULT BUT NOT THIS ONE.

THE FACTS IN THIS CASE SPELL OUT A PICTURE OF A COURSE OF CONDUCT SO DEVOID OF CONSCIENCE, SO BENT ON THE MALICE THE JUDGE TOLD YOU ABOUT THE OTHER DAY, SO LACKING IN COMPASSION AND SOCIAL CONSCIENCE THAT IT COMPELS ONE, IT MANDATES ONE TO REACH THE CONCLUSION THAT DEATH IS WARRANTED.

AS WE SAT IN HERE YESTERDAY, WE LISTENED TO [Tr. 2053] EVIDENCE PRESENTED BY THE DEFENSE WHICH WAS INTENDED TO, AND THEY WILL ARGUE TO YOU IN A MOMENT, TO MITIGATE THE CONDUCT OF JONATHAN SIMMONS. FOR TWO OR TWO AND A HALF HOURS WE HEARD FROM A SOCIAL WORKER, FROM AN HOUR TO AN HOUR AND A HALF WE HEARD FROM A PSYCHOLOGIST. AND IT BECAME CLEAR TO ME YESTERDAY THAT PERHAPS I WAS PREMATURE WHEN I ARGUED TO YOU IN THE GUILT STAGE OF THIS CASE THAT THEY WOULD ATTEMPT TO MAKE AN ELEPHANT DISAPPEAR. YESTERDAY'S PERFORMANCE WAS CALCULATED TO SHIFT RESPONSIBILITY FROM JONATHAN SIMMONS TO ANY ONE OF A NUMBER OF PEOPLE OR CIRCUMSTANCES TO THE FACT, INTERESTINGLY ENOUGH, THAT HIS MOTHER HAD A TOUGH TIME WHEN SHE WAS PREGNANT TO THE FACT THAT HIS FATHER WAS A HARSH DISCIPLINARIAN OR ABUSED HIM TO THE FACT THAT HE WAS SEXUALLY ABUSED, IF YOU BELIEVE THOSE TO BE FACTS, AND I WOULD SUBMIT TO YOU THE EVIDENCE YESTERDAY WAS NOT EVEN CONCLUSIVE THAT THOSE CIRCUMSTANCES WERE ONES HE LABORED UNDER. THIS PATTERN OF SEXUAL ABUSE THAT THE SOCIAL WORKER IN HIS

CHART BUILT THIS – I CAN'T REMEMBER THE GENEALOGICAL CHART ON WAS BASED ON THE FACT THAT EVERYONE ON ONE SIDE OF THE FAMILY HAD BEEN – HAD COMMITTED INCEST OR BEEN SEXUALLY ABUSED AND, YET, WE CALLED TO THE STAND TWO OF THOSE PEOPLE WHO HAD BEEN SITTING IN THE COURTROOM, TWO AUNTS WHO TESTIFIED NO, NO INCEST. THAT MITIGATION IS BUILT ON THE PREMISE THAT JONATHAN SIMMONS WAS SEXUALLY [Tr. 2054] ABUSED BY THIS LADY RIGHT HERE. JONATHAN SIMMONS, ACCORDING TO THAT SOCIAL WORKER AND HIS OWN PSYCHOLOGIST, SAYS THAT THIS WOMAN HAD SEX WITH JONATHAN SIMMONS FROM AGE 11 ON, THREE TO FIVE TIMES A WEEK. NOT ONLY DOES HE BEAT HER UP, NOT ONLY DOES HE RAPE HIS OWN GRANDMOTHER, HIS EXCUSE FOR THIS COURSE OF CONDUCT TO YOU, THE JURY, IS THAT SHE SEXUALLY ABUSED HIM FOR THE PAST TEN YEARS.

NOW, LADIES AND GENTLEMEN, IS THAT MITIGATING EVIDENCE? IS THAT WHAT YOU WOULD USE TO CALCULATE MERCY IN THIS CASE? THE ELEPHANT. I GOT THE ELEPHANT RIGHT HERE THAT THEY TRIED TO MAKE DISAPPEAR. DON'T GO BACK IN THAT JURY ROOM AND NOT LOOK AT THIS. DON'T GO BACK IN THAT JURY ROOM AND SAY, POOR, JONATHAN, A PRODUCT OF HIS ENVIRONMENT, A YOUNG MAN WHO FROM BIRTH WAS ON THIS ROAD TO RUINATION. THIS IS HIS HANDY WORK. THIS IS HOW HE LEFT JOSIE LAMB.

THE ENORMITY OF THIS CRIME PERHAPS IS LOST IN THE CLINICAL APPROACH WE TAKE IN A

COURTROOM. IT HAS TO BE VIEWED IN THE CONTEXT OF WHAT HAPPENED BEFORE IT AND WHY IT HAPPENED. THESE THREE WOMEN OVER HERE, MS. MIMS, ESPECIALLY, ON THE END. YOU REMEMBER MS. MIMS, ABOUT THIRTY DAYS BEFORE THE DEATH OF JOSIE LAMB, JONATHAN SIMMONS CAME TO HER FRONT DOOR ASKED FOR DIRECTIONS. HE WENT AROUND TO THE SIDE DOOR FORCED HIS WAY IN, FOLLOWED HER IN THROUGH TWO ROOMS, TRIPPED HER, FELL TOP [sic] OF HER. ATTEMPTED TO HAVE SEX WITH HER. TIED HER UP. CHOKED HER. [Tr. 2055] HER STATEMENT TO THE POLICE OFFICERS IS SHE FAKED DEATH BECAUSE HE HAD TIGHTENED – TIGHTENED THAT BIND AROUND HER NECK SO TIGHTLY HE THOUGHT HE WAS CHOKING HER IS WHAT SHE TOLD THE POLICE. HE LEFT HER FOR DEAD.

HIS GRANDMOTHER, OWN GRANDMOTHER, BEATEN SO BADLY THAT WHEN SHE TOOK THE STAND SHE COULDN'T REMEMBER WHO DID IT.

MS. FURTICK. YOU HEARD THE DESCRIPTION OF MS. FURTICK. BLOOD RUNNING OUT OF HER NOSE. BLOOD RUNNING OUT OF HER EARS. EYES SWOLLEN SHUT. RAPED. BEATEN. YOU HAVE ALSO HEARD TESTIMONY THAT JONATHAN SIMMONS PLED GUILTY TO THE SEXUAL ASSAULT ON HIS GRANDMOTHER AND PLED GUILTY TO THE BURGLARY AND SEXUAL ASSAULT ON MS. FURTICK. THESE CONFESSIONS AND STATEMENTS THAT WE INTRODUCED WHERE HE ADMITTED WHAT HE DID ARE CONFIRMED BY THAT GUILTY PLEA.

AS YOU WEIGH YOUR DECISION IN THIS CASE, THE JUDGE IS GOING TO TELL YOU THAT, FIRST OF ALL, THE STATE HAS TO PROVE TO YOU BEYOND A REASONABLE DOUBT THE EXISTENCE OF AN AGGRAVATING CIRCUMSTANCE, THE STATUTORY AGGRAVATING CIRCUMSTANCE. AND THE STATUTORY AGGRAVATING CIRCUMSTANCE THAT WE ARE RELYING ON IS BURGLARY. YOU HAVE ALREADY FOUND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THAT BY FINDING HIM GUILTY OF BURGLARY. THE JUDGE WILL THEN TELL YOU THAT CAN CONSIDER AND HE WILL OUTLINE FOR YOU CERTAIN STATUTORY MITIGATING CIRCUMSTANCES AND ANY OTHER MITIGATING [Tr. 2056] CIRCUMSTANCES YOU WANT TO CONSIDER. LET ME SAY THIS TO YOU. ONCE YOU FIND THAT AGGRAVATING CIRCUMSTANCE, YOU ARE AUTHORIZED BY LAW TO FIND A SENTENCE OF DEATH. IF YOU FIND EVERY MITIGATING CIRCUMSTANCE AND OTHERS, YOU ARE STILL AUTHORIZED TO FIND A SENTENCE TO DEATH.

THE ISSUE IN THIS CASE IS NOT WHY JONATHAN SIMMONS RAPED AND BRUTALLY ATTACKED THESE THREE WOMEN AND THEN DID THIS TO JOSIE LAMB. THE ISSUE IS TWOFOLD. WHAT IS THE APPROPRIATE PUNISHMENT FOR THAT COURSE OF CONDUCT? AND, AGAIN, EACH ONE OF YOU HAVE INDICATED THAT YOU FEEL THAT THE DEATH PENALTY IS APPROPRIATE IN SOME CIRCUMSTANCES. ARE THESE THE PROPER CIRCUMSTANCES? I SUBMIT TO YOU IF NOT THESE, THEN WHAT?

THE SECOND REASON THAT YOU WOULD SENTENCE SOMEONE TO DEATH. PERHAPS, OH, THE FIRST REASON, PUNISHMENT, IS ENOUGH, MIGHT BE DETERRENCE. AN I'M NOT ABOUT TO STAND UP HERE THIS MORNING AND DEBATE WITH YOU AN ISSUE THAT HAS PLAGUED SOCIETY SINCE THE BEGINNING OF TIME. WHETHER OR NOT THE SENTENCE OF DEATH FOR JONATHAN SIMMONS WILL DETER ANYBODY ELSE, I SUBMIT TO YOU THE FACT THAT IT WILL DETER HIM IS PLENTY. THAT'S ALL WE ARE HERE TO DO IS TO DEFER HIM.

HIS OWN PSYCHOLOGIST YESTERDAY, MR. EVANS, DR. EVANS TESTIFIED HE WAS "DANGEROUS". THE CENTRAL ISSUE, AGAIN, IS WHETHER YOU WILL IGNORE THE FACTS AND [Tr. 2057] CIRCUMSTANCES SURROUNDING THIS CASE AND THE COURSE OF CONDUCT OF JONATHAN SIMMONS AND BE PERSUADED BY WHAT I SUBMIT TO YOU ARE IMPROPER CONSIDERATIONS. NOT IMPROPER UNDER THE LAW BECAUSE YOU CAN CONSIDER ANYTHING YOU WANT. BUT IMPROPER IN THE SENSE OF A RATIONAL EXAMINATION AND DECISION AS TO WHAT SHOULD HAPPEN IN THIS CASE. THE DEFENSE IN THIS CASE HAS THROWN EVERYTHING EXCEPT THE KITCHEN SINK IN MITIGATION. THE SHAMELESS DISPLAY OF HIS EIGHT YEAR-OLD BROTHER YESTERDAY. THE WILLINGNESS OF THIS DEFENDANT TO DO ANYTHING TO ESCAPE, I SUBMIT TO YOU, IT'S SHAMEFUL.

LET'S LOOK AT THE PARTICULAR CIRCUMSTANCES AND I KNOW I'VE REVIEWED THIS WITH YOU THREE DAYS AGO BUT I WANT TO MAKE SURE

WE GO OVER IT AGAIN. JONATHAN SIMMONS IN HIS STATEMENT INDICATES THAT HE WAS LOOKING FOR SOMEONE NAMED JIMMY WHEN HE WENT TO JOSIE LAMB'S HOUSE. HE HAD GONE THERE A WEEK BEFORE AND HE INDICATES THAT WHEN HE WENT TO THE DOOR AND TRIED IT, A WOMAN SCREAMED AND HE RAN OFF. HE THEN CAME BACK AGAIN LOOKING FOR JIMMY. HE SAID HE OWED HIM 50 DOLLARS AND WENT TO THE DOOR. WENT IN AND SO, I'M NOT MISQUOTING HIM, "I WENT TO THE SCREEN DOOR ON THE SIDE OF THE HOUSE. I WENT IN THE DOOR AND HEARD THE WOMAN SCREAM. SHE SAID FOR ME TO GET OUT OR SHE WOULD CALL THE POLICE. I LOOKED AROUND THE REST OF HOUSE. I DIDN'T SEE ANYONE ELSE. SHE HIT ME WITH SOMETHING IN THE BACK OF THE [Tr. 2058] HEAD AND ON THE RIGHT HAND. THIS TOOK PLACE IN THE BATHROOM. I PICKED UP THE COMMODE LID AND HIT HER IN THE HEAD TWICE, SHE FELL. THAT'S WHEN I LEFT AND WENT INTO THE HOUSE AND LOOKED AROUND. A WALKED BACK TO THE BATHROOM AND STEPPED INTO SOME BLOOD. I WALKED BACK OUT THE SIDE DOOR." AND HE ADMITTED ALSO UNPLUGGING THE PHONE CORD. THIS IS A LIE. I SUBMIT TO YOU WHAT HAPPENED IN THIS CASE IS THAT WHEN JONATHAN SIMMONS CAME IN THAT BACK DOOR, JOSIE LAMB WAS SITTING ON THE TOILET. YOU REMEMBER THE TOILET AND BATHROOM IN THIS HOUSE, IF YOU COME IN THIS BACK DOOR, IS RIGHT OVER HERE. IT'S TO THE RIGHT OR TO YOUR LEFT

COMING IN THE DOOR. THAT'S WHERE THE BATHROOM IS. APPARENTLY IN THESE OLD HOUSES DOWN IN OLYMPIA, THEY'VE LOCATED THE BATHROOMS – MAYBE IT WAS OUTSIDE AT ONE POINT. THIS HOUSE IS VERY OLD. HE CAME IN THE BACK DOOR. HE KNEW WHO WAS THERE. HE HAD BEEN THERE THE WEEK BEFORE. HE KNEW IT WAS AN ELDERLY WOMAN. HE KNEW THAT SHE LIVED ALONE. HE'S RIGHT, HE DID GO IN THE REST OF THE HOUSE TO LOOK AROUND AND SEE IF ANYBODY WAS THERE AND HE UNPLUGGED THE PHONE. MS. LAMB WAS ON THE TOILET ATTEMPTING TO GO TO THE BATHROOM. SHE REACHED OVER AND GRABBED THIS TOILET PAPER. SHE NEVER GOT A CHANCE TO USE IT BECAUSE HE CAME IN THE DOOR. SHE STOOD UP AND AS SHE STOOD UP, HE GRABBED THE BACK OF THIS TOILET AND SHE YELLED AT HIM AND TOLD HIM TO GET OUT OF HER HOUSE. HE GRABBED THE TOP OF THE TOILET AND [Tr. 2059] THE FIRST BLOW WAS AS SHE WAS EITHER SITTING ON THE TOILET OR JUST GETTING UP BECAUSE THERE'S NO BLOOD ON THE TOILET SEAT. IT'S ON THE BACK OF THE TOILET. IT'S IN THE BACK OF THE SEAT, BUT THERE'S NONE HERE. IT'S HUMAN FECES RIGHT HERE ON THE CORNER AS SHE SLID OFF. SHE CONTINUED TO MOVE OVER. HER HEAD MUST HAVE BEEN ABOVE – I WOULD SUBMIT TO YOU ABOVE THIS HAMPER BECAUSE THERE IS A TRAIL OF BLOOD, BLOOD STILL RUNNING DOWN. SHE FALLS BACK UP AGAINST THE WALL. WE EVEN SEE SPLATTERS OF BLOOD UP BEHIND THIS HEATER AND A SMEAR AS SHE FELL

DOWN, IN HER RIGHT HAND STILL GRIPPING IT, THIS TOILET PAPER. AGAIN, MERCY. NINE TIMES. MERCY. NINE TIMES HE SWUNG THIS INTO HER SKULL. SHE MOVED ACROSS THE ROOM. AS SHE WENT DOWN, HE'S SWINGING. BLOOD SPLATTERING EVERYWHERE, ON HIM, ON THE WALL. A 79-YEAR-OLD WOMAN, DEFENSELESS. THIS WASN'T ANYTHING NEW TO HIM. HE HAD DONE IT BEFORE.

WHAT'S THE PATTERN HERE? MS. MIMS. WHY DID YOU PICK THE VICTIM'S HOUSE? I WAS JUST TAKING A CHANCE. WHEN I SAW THE OLD LADY AND I DECIDED TO GO IN ON HER. DID YOU HAVE A WEAPON? NO, I DIDN'T NEED ONE WITH THAT OLD LADY. AND INTERESTINGLY ENOUGH, WHAT IS THE MOTIVE HERE. WHAT'S THE MOTIVE? I SUBMIT TO YOU THE MOTIVE IS THIS. WE HAVE A PERSON WHO HAS DECIDED TO GET WHAT HE WANTS OUT OF LIFE, I SUBMIT TO YOU, THE EASIEST WAY TO GET IT IS TO PREY ON PEOPLE WHO CAN'T FIGHT BACK, WHO CAN'T RESIST. LIKE A [Tr. 2060] JACKAL CIRCLING A HERD, LOOKING FOR THE OLD. LOOKING FOR THE INFIRM. LOOKING FOR SOMEONE TO VICTIMIZE THAT CAN'T HURT HIM. HE TAKES THE TWO THINGS HE WANTS. HE NEEDS SEX. NOW, YOU MAY NOT REGARD IT AS SEX. I MIGHT NOT REGARD IT AS SEX. BUT WHEN HE WAS ASKED ABOUT MS. MIMS. I WANT YOU TO LOOK AT MS. MIMS OVER HERE. THE LADY ON THE RIGHT IN THE BLUE PANTS.

QUESTION: DID YOU EJACULATE?

ANSWER: YES JUST FROM THE FOREPLAY.

NOW, LADIES AND GENTLEMEN OF THE JURY, HE IS JUST DESCRIBED KNOCKING HER TO THE GROUND. I RUBBED MY PENIS IN THAT AREA. ANAL SEX. I COULDN'T GET IT IN. I COULDN'T GET IT IN FOR INTERCOURSE. DID YOU ATTEMPT ANAL SEX? I JUST RUBBED MY PENIS IN THAT AREA. I COULDN'T GET IT IN. DID YOU EJACULATE? YES, JUST FROM THE FOREPLAY. FOREPLAY.

I AM SORRY THAT WE HAVE TO PUT MS. MIMS AND MS. FURTICK, MS. SIMMONS THROUGH THIS PROCESS. BUT IF WE HAD NOT BROUGHT THEM HERE, THIS WOULD BE SUCH AN ANTISEPTIC, SUCH A CLINICAL VIEW FOR YOU. I WANTED YOU TO SEE WHAT THE VICTIMS OF HIS ASSAULTS LOOK LIKE. I WANTED YOU TO SEE THE PATTERN. LIKE A JACKAL CIRCLING THE HERD. HE PICKS ON THOSE WHO CAN'T FIGHT BACK. HE PICKS ON THOSE WHO CAN'T DEFEND THEMSELVES. HE PICKS ON THOSE WHO HE CAN HURT OR KILL WITH LITTLE OR NO HARM TO HIMSELF. ATTACKED FOUR OTHER ADULTS. NOT A SCRATCH. IN THEIR HOMES. NOT A [Tr. 2061] SCRATCH. COULD DO WHAT HE WANT [sic], TAKE WHAT HE WANTS. WENT TO THE REFRIGERATOR ON ONE OF THESE AFTER HE GETS DONE SEXUALLY ASSAULTING AND BEATING UP A 70-YEAR-OLD WOMAN, HE GOES TO THE REFRIGERATOR AND GETS A SOFT DRINK AFTER GETTING HER MONEY, WHAT DID YOU TAKE? MS. MIMS, ABOUT 50 DOLLARS FROM HER PURSE AND A DRINK FROM HER REFRIGERATOR. CASUAL. NOTHING SERIOUS ABOUT THIS TO HIM. ALL IN A DAY'S WORK. DEVOID OF SOCIAL CONSCIENCE.

NOW, DO WE FOCUS ON HOW HE GOT THAT WAY BECAUSE, AGAIN, THAT IS A QUESTION WHICH HAS BAFFLED SOCIOLOGISTS, PSYCHOLOGISTS, PHILOSOPHERS, RELIGIOUS LEADERS FOR CENTURIES AND WE ARE NOT GOING TO RESOLVE IT HERE TODAY AND THAT'S NOT YOUR JOB.

YOU WILL HEAR IN A MOMENT FROM DEFENSE COUNSEL AND THEY ARE GOING TO SUBMIT, TO YOU GIVE YOU A LITANY OF REASONS TO EXCUSE THIS CONDUCT THEY CALL MITIGATING FACTORS. THEY ARE GOING TO TELL YOU TO CONSIDER EVIDENCE THAT THE MURDER WAS COMMITTED WHILE UNDER THE INFLUENCE OF MENTAL OR EMOTIONAL DISTURBANCE. THEY ARE GOING TO ASK YOU TO CONSIDER THE FACT THAT THEIR CLIENT DIDN'T APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR BE ABLE TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW OR WAS SUBSTANTIALLY IMPAIRED. THEY WANT YOU TO CONSIDER THE AGE OR MENTALITY OF HIM AT THE TIME OF THE CRIME.

MR. QUINN: YOUR HONOR, I'M GOING TO OBJECT. [Tr. 2062] YOUR HONOR IS GOING TO CHARGE THE JURY THAT THEY MUST CONSIDER THOSE FACTORS AS I UNDERSTAND IT.

THE COURT: THAT IS CORRECT. PROCEED, MR. SOLICITOR.

THE SOLICITOR: THEY ARE GONG TO ASK YOU TO CONSIDER THE EFFECTS OF SEXUAL ABUSE DURING HIS INFANCY, CHILDHOOD AND ADOLESCENCE, THE EFFECTS OF PHYSICAL ABUSE IN

INFANCY, CHILDHOOD AND ADOLESCENCE, THE EFFECTS OF A DYSFUNCTIONAL FAMILY, EVIDENCE THAT HIS FATHER NEVER COULD DEVELOP A FATHER-SON RELATIONSHIP, HE WAS NEGLECTED AS A CHILD, THE CIRCUMSTANCES SURROUNDING THE PREGNANCY OF HIS MOTHER, HE WAS RAISED IN DEPRIVED UNDER PRIVILEGED CIRCUMSTANCES, THAT HE EXHIBITED EARLY SIGNS OF MENTAL OR EMOTIONAL DISTURBANCE, HIS I.Q., LACK OF EDUCATION AND IMPAIRED REASON AND JUDGMENT, HIS MENTAL OR EMOTIONAL DEVELOPMENT IS SIGNIFICANTLY BELOW THAT OF PERSONS OF HIS CHRONOLOGICAL AGE, HIS MENTAL OR EMOTIONAL DISTURBANCE WAS AGGRAVATED THROUGHOUT HIS CHILDHOOD AND EARLY ADULTHOOD BY THE ACTIONS AND INTERACTIONS OF FAMILY MEMBERS. THAT JONATHAN SIMMONS' USE, MISUSE OR ABUSE OF DRUGS WAS AS A RESULT OF HIS MENTAL OR EMOTIONAL DISTURBANCE. THAT THE AFFECTS [sic] OF COCAINE AND OTHER DRUGS AT THE TIME OF THE CRIME WAS A MITIGATING CIRCUMSTANCE. THAT HE DID NOT RESIST ARREST. THAT HE VOLUNTARILY CONFESSED. THAT HIS REMORSE OF THE CRIME IS A MITIGATING CIRCUMSTANCE. HIS COOPERATION [Tr. 2063] WITH LAW ENFORCEMENT IS A MITIGATING CIRCUMSTANCE. HIS ABILITY TO ADJUST AND ADAPT TO PRISON IS A MITIGATING CIRCUMSTANCE AND HE HAS SHOWN NO TENDENCY TOWARDS VIOLENCE AGAINST OTHERS AS A MITIGATING CIRCUMSTANCE. HE'S ADAPTED WELL TO PRISON SINCE HE'S BEEN IN JAIL. HE'S TREATABLE IN PRISON. HE'S

CAPABLE OF HELPING OTHER INMATES AND ANYTHING ELSE THAT YOU COULD POSSIBLY GARNER, SCRATCH, DIG FROM THE EVIDENCE THEY PRESENTED.

NOW, THE JUDGE IS GOING TO TELL YOU, YOU MUST CONSIDER THESE. CONSIDER. NOT ADOPT, NOT BUY, NOT BELIEVE, CONSIDER. YOU MUST REACH A VERDICT THAT YOU ARE COMFORTABLE WITH BASED ON ALL OF THE FACTS AND CIRCUMSTANCES IN THIS CASE. YOU MUST REACH A VERDICT WHICH SPEAKS THE TRUTH. YOU MUST REACH A VERDICT THAT MAKES YOU COMFORTABLE. YOU MUST REACH A VERDICT THAT YOU CAN COME OUT AND LOOK HIM IN THE EYE AND PRONOUNCE, BUT, LADIES AND GENTLEMEN, HIS EYES AREN'T THE ONLY ONES. REMEMBER MS. FURTICK. REMEMBER MS. SIMMONS. REMEMBER MS. MIMS. LOOK IN THEIR EYES. AND POOR JOSIE LAMB, THE TERROR, THE FEAR, THE PAIN.

I'M NOT GOING TO STAND UP HERE, STAND UP HERE AS SOME PROSECUTORS DO AND TRY TO EMOTE SOME EMOTIONAL RESPONSE FROM YOU. I'M NOT GOING TO STAND UP HERE AND WEEP AND WAIL AND SCREAM AND YELL BECAUSE THAT'S NOT WHAT THIS IS ABOUT. YOUR VERDICT SHOULDN'T BE RETURNED IN ANGER. [Tr. 2064] YOUR VERDICT SHOULDN'T BE AN EMOTIONAL CATHARSIS. YOUR VERDICT SHOULDN'T BE ONE THAT IS A RESPONSE TO THAT EIGHT-YEAR-OLD KID SITTING OVER THERE AND REALLY SHOULDN'T BE A RESPONSE TO THE GRUESOME GROTESQUE

HANDIWORK OF JONATHAN SIMMONS. YOUR VERDICT SHOULD BE A RESPONSE OF SOCIETY TO SOMEONE WHO IS A THREAT. YOUR VERDICT WILL BE AN ACT OF SELF-DEFENSE.

WELL, AS THE JUDGE TOLD YOU INITIALLY, THIS PROCESS IS CALLED FINAL ARGUMENT. HE SAYS THAT'S A MISNOMER BECAUSE YOU DON'T GET TO ARGUE WITH ME. YOU SEE, I DON'T GET TO STAND UP HERE AND SAY SOMETHING AND THEN ONE OF YOU SAY NO, NO THAT'S WRONG. AND THEN I GET TO SAY, BUT DID YOU THINK ABOUT THIS.

IN A MOMENT AT LEAST TWO AND PERHAPS THREE OF HIS ATTORNEYS ARE GOING TO HAVE AN OPPORTUNITY TO TALK TO YOU. THEY GET THE LAST ARGUMENT. I DON'T GET TO SAY ANOTHER WORD WHATSOEVER. AND THEN THE JUDGE IS GOING TO TELL YOU WHAT THE LAW IS IN THIS CASE. LISTEN VERY CAREFULLY TO THAT LAW.

THE DEFENSE IN THIS CASE AS TO SENTENCE, I THINK I HAVE OUTLINED FOR YOU, IT'S A DIVERSION. IT'S PUTTING THE BLAME ON SOCIETY, ON HIS FATHER, ON HIS GRANDMOTHER, ON WHOEVER ELSE HE CAN, SPREADING IT OUT TO AVOID THAT PERSONAL RESPONSIBILITY. THAT HE CAME FROM A DEPRIVED BACKGROUND. THAT HE DIDN'T HAVE ALL OF THE BREAKS IN LIFE [Tr. 2065] AND CERTAINLY THAT HELPS SHAPE SOMEONE. BUT WE ARE NOT CONCERNED ABOUT HOW HE GOT SHAPED. WE ARE CONCERNED ABOUT WHAT TO DO WITH HIM NOW THAT HE IS IN OUR MIDST.

AS YOU LISTEN TO DEFENSE COUNSEL, IF THEY BECOME EMOTIONAL AND ASK YOU FOR MERCY, REMEMBER, THEY DIDN'T KILL ANYBODY. TOM QUINN, JENNIFER KNEECE SHEALY, TOMMY BUNCH THEY DIDN'T BEAT JOSIE LAMB'S SKULL IN. THEY DIDN'T RAPE MS. FURTICK OVER THERE AND BEAT HER TO A PULP. THEY DIDN'T RAPE MS. SIMMONS OVER THERE AND BEAT HER TO A PULP. THEY DIDN'T TIE UP MS. MIMS AND TERRORIZE HER AND BEAT HER UP AND RAPE HER. THEY DIDN'T DO THAT. HE DID.

AS THEY ATTEMPT TO SHIFT BLAME TO MOM AND DAD, SOCIETY, DYSFUNCTIONAL FAMILY, INCEST, REMEMBER HIS DAD, HOWEVER BAD HE IS, HE WASN'T DOWN ON OLYMPIA AVENUE ON THE MORNING OF JULY 16TH – THE EVENING OF JULY 16TH. HIS DAD WASN'T IN MS. FURLICK'S HOUSE OR MS. MIMS' HOUSE. THIS IS AN ATTEMPT ON THEIR PART, I SUBMIT TO YOU, TO MAKE YOU FEEL UNEASY. TO PUT A DOUBT IN YOUR MIND ABOUT WHAT YOU SHOULD DO.

I WANT YOU TO AS YOU THINK ABOUT THAT, AS YOU LISTEN TO WHAT THEY HAVE TO SAY, REMEMBER THIS, EACH AND EVERY ONE OF YOU CAME UP PUT YOUR HAND ON THE BIBLE AND SAID I CAN SIGN MY NAME TO THAT DEATH VERDICT UNDER THE PROPER CIRCUMSTANCES. IF NOT THIS, IF YOU CANNOT SIGN YOUR NAME TO THAT VERDICT AND COME OUT AND LOOK THIS MAN IN THE [Tr. 2066] EYE, YOU WILL VIOLATE, I SUBMIT, THAT OATH.

YOU ARE NOT HERE TO GIVE MERCY. YOU ARE HERE TO DO JUSTICE. JUSTICE DEMANDS A VERDICT OF DEATH IN THIS CASE. IF I IN THE PROCESS OF MY ARGUMENT TODAY OR MY PRESENTATION HAVE OFFENDED YOU IN ANY WAY WHATSOEVER, PLEASE, DON'T HOLD THAT AGAINST THE STATE OF SOUTH CAROLINA IF MR. GASSER OVER HERE OR MR. GIESE WHO HAVE WORKED WITH ME ON THIS CASE OR ANY OF THE OFFICERS WHO'VE TESTIFIED OR ANY OF THE WITNESSES THAT WE HAVE PUT UP, HAVE OFFENDED YOU IN ANY WAY, PLEASE, DON'T HOLD THAT AGAINST THE STATE OF SOUTH CAROLINA. DO WHAT IS RIGHT BASED ON THE FACTS. DON'T TAKE THE EASY WAY OUT AND SAY WELL, THAT'S TOUGH. IT IS TOUGH. DON'T AVOID YOUR RESPONSIBILITY. IT WILL BE AN ACT OF SELF-DEFENSE. THANK YOU.

THE COURT: COUNSEL.

MR. BUNCH: YES, YOUR HONOR.

THE COURT: MR. BUNCH.

MR. BUNCH: LET ME TAKE CARE OF A LITTLE HOUSECLEANING FIRST, YOUR HONOR. I AM GOING TO USE THE PODIUM, LADIES AND GENTLEMEN, BECAUSE I'M NOT AS CONTEMPORANEOUS OR OFF-THE-CUFF, WHATEVER YOU WANT TO CALL IT.

MR. FOREMAN, LADIES AND GENTLEMEN OF THE JURY, I COME TO YOU TODAY WITH A DIFFICULT TASK. I COME TO YOU TODAY FEELING INADEQUATE FOR THE TASK. ASKING YOU TO [Tr. 2067]

INCARCERATE JONATHAN SIMMONS TO PRISON FOR LIFE. I DON'T ASK YOU TO EXCUSE HIS CONDUCT. WE CAN'T CONDONE HIS CONDUCT AND WE MUST BLAME JONATHAN SIMMONS FOR THAT CONDUCT. HE IS THE PERPETRATOR IN THIS CASE BUT UNLIKE THE SOLICITOR AS HE SAYS THE ISSUE IN THIS PART OF THE TRIAL IS AND WHAT WE HAVE TO FOCUS ON IS WHY HE DID IT. THAT'S WHY YOU HAVE TWO SEPARATE PARTS OF THE TRIAL. THAT'S WHY THE FIRST PART IS CONCERNED ONLY WITH WHETHER HE'S GUILTY OR INNOCENT AND THE SECOND PART IS YOUR DETERMINATION OF THE PENALTY OR THE PUNISHMENT.

SO, THE SOLE PURPOSE OF THE SECOND PART OF THE TRIAL IS TO FOCUS ON SOME RATIONAL BASIS OR UNDERSTANDING OF WHY THE CRIME WAS COMMITTED. AND I SUBMIT TO YOU, LADIES AND GENTLEMEN, EVEN THOUGH WE CAN'T CONDONE IT, HE IS THE BLAMEWORTHY PERSON, WE CAN'T EXCUSE IT, WE CAN COME TO A RATIONAL BASIS AND UNDERSTANDING AS TO WHY JONATHAN ACTS THIS WAY. THAT RATIONAL BASIS AND UNDERSTANDING WAS PRESENTED YESTERDAY IN THAT JONATHAN DALE SIMMONS IS SUFFERING FROM A SEVERE EMOTIONAL DISORDER. THIS IS CALLED A DISSOCIATIVE DISORDER IN THE MEDICAL LINGO OR TERMINOLOGY. THIS IS THE OPINION AND DIAGNOSIS OF DR. JAMES R. EVANS WHO HAS BEEN DOING THIS TYPE OF WORK FOR THIRTY YEARS. HE'S BEEN A PROFESSOR AT THE UNIVERSITY OF SOUTH CAROLINA FOR TWENTY

YEARS. HE HAS EXPERIENCE IN THIS AREA. THIS IS WHAT HE DOES.

[Tr. 2068] LET'S EXAMINE SOME OF THE EVIDENCE THAT CAME BEFORE YOU YESTERDAY. LET'S SEE WHAT THE PEOPLE AGREED UPON, WHAT WAS UNCONTROVERTED AND LET'S SEE WHAT THERE WAS SOME DISAGREEMENT ON.

FIRST OF ALL, EVERY DOCTOR THAT CAME BEFORE YOU YESTERDAY AGREED THAT PHYSICAL ABUSE CAN CAUSE THE MENTAL DISORDER WHICH JONATHAN HAS. EVERY DOCTOR THAT CAME BEFORE YOU YESTERDAY AGREED THAT SEXUAL ABUSE CAN CAUSE A DISSOCIATIVE DISORDER AND EVERYBODY THAT CAME BEFORE YOU YESTERDAY, WHEN THE QUESTION WAS SUBMITTED TO THEM, AGREED THAT, YES, ONE CAN FEIGN SYMPTOMS OF A MENTAL ILLNESS, ONE CAN GIVE INAPPROPRIATE RESPONSES IN PSYCHOLOGICAL TESTING, BUT AND AT THE SAME TIME, THEY CAN HAVE THAT MENTAL ILLNESS OR ANOTHER MENTAL ILLNESS. AT THE SAME TIME THEY CAN BE MENTALLY ILL AND HAVE A MENTAL DISORDER. THAT'S WHAT EVERYBODY HAS AGREED UPON.

LET'S LOOK AT SOME THINGS THAT ARE UNCONTROVERTED. JONATHAN'S FAMILY WAS ABSOLUTELY AND COMPLETELY DYSFUNCTIONAL. IF YOU NEED NO FURTHER EVIDENCE OF THAT, LOOK AROUND THE COURTROOM, LADIES AND GENTLEMEN OF THE JURY. JOHN SIMMONS' FATHER HAS NOT BEEN HERE ALL WEEK WHILE HIS SON HAS BEEN ON TRIAL. HE'S ABANDONED HIM THIS

WEEK JUST LIKE HE ABANDONED HIM AND HAD NOTHING TO DO WITH HIM AND BEAT HIM FROM THE TIME HE WAS A CHILD.

WHAT ELSE IS UNCONTROVERTED? JONATHAN SIMMONS [Tr. 2069] FAILED THE ONLY DISSOCIATION TEST THAT WAS EVER GIVEN TO HIM. DR. EVANS GAVE HIM A TEST ONCE HE SUSPECTED DISSOCIATIVE DISORDER, TO DETERMINE WHETHER HE HAD THAT DISEASE, WHETHER HE HAD THAT MENTAL ILLNESS. HE SCORED POSITIVE RESPONSES ON TWENTY OF THE 28 TESTS OR QUESTIONS OR WHATEVER THEY WERE THAT DR. EVANS GAVE HIM. THE STATE HOSPITAL NEVER TESTED HIM FOR DISSOCIATION. THEY TESTED HIM TO SEE IF HE COULD UNDERSTAND HIS MIRANDA RIGHTS THAT THESE POLICEMEN GIVE HIM. THEY TESTED HIM TO SEE IF HE COULD ASSIST HIS ATTORNEYS IN PRESENTING A DEFENSE. WHAT DOES THAT TELL YOU ABOUT ANY REASON? THEY NEVER TESTED HIM FOR THE DISSOCIATION.

WHAT ELSE IS UNCONTROVERTED? THESE DRUGS AND ALCOHOL THAT JONATHAN CHOSE TO USE AND IT WAS HIS CHOICE. IT WASN'T ANYBODY ELSE'S CHOICE. IT WAS HIS CHOICE. THE DRUGS AND ALCOHOL THAT HE USED EXACERBATE OR MAKE WORST [sic] OR TRIGGER THAT DISSOCIATIVE DISORDER.

WHAT IS IN DISPUTE? SOME OF THESE ITEMS ARE MORE DISPUTED THAN OTHERS. BUT FIRST OF ALL, LET'S START WITH HIS INTELLIGENCE. HE'S

BEEN DIAGNOSED AS HAVING BORDERLINE INTELLECTUAL FUNCTIONING. HE NEVER DID WELL IN SCHOOL. HE WAS IN SPECIAL EDUCATION CLASSES. HISTORICALLY, HIS INTELLIGENCE LEVEL HAS BEEN DIAGNOSED AS BORDERLINE INTELLIGENCE FUNCTIONING. THAT MEANS HE IS BARELY ABOVE MENTALLY RETARDED. THE VALID AND CONSISTED TEST SCORES WE [Tr. 2070] HAVE SHOW [sic] IN THE 70'S. MENTAL RETARDATION IS AT 70. THE STATE HOSPITAL AGREED IN 1990 THAT THAT WAS THE LEVEL OF HIS INTELLIGENCE. DR. ELLISON, THE DOCTOR THAT WAS PUT ON THE STAND YESTERDAY BY THE STATE, SAID IN 1980 OR 1990, THAT IS, HE SIGNED OFF ON THE REPORT FOR THE STATE HOSPITAL, BORDERLINE INTELLIGENCE FUNCTIONING. NOW, SOMEHOW, AFTER A ONE-HOUR INTERVIEW, HE'S COME IN HERE AND CHANGED HIS DIAGNOSES A YEAR LATER TO SAY OH, HE'S MUCH SMARTER THAN WE ORIGINALLY GAVE HIM CREDIT FOR. YET, HE'S CONTRADICTING THE DIAGNOSIS OF HIS OWN STAFF. HE'S CONTRADICTING YEARS OF HISTORY, YEARS OF TESTING.

THE USE OF ALCOHOL OR DRUGS. LIEUTENANT WILSON TESTIFIED – WELL, LIEUTENANT WILSON TESTIFIED THAT HE TOOK JONATHAN SIMMONS' STATEMENT IN THE JOSIE LAMB MATTER. LIEUTENANT WILSON WROTE THE STATEMENT OUT AND SAID I WAS NOT UNDER THE INFLUENCE OF ALCOHOL OR DRUGS. LIEUTENANT WILSON'S COWORKER, MR. NELSON, COMES UP AND SAID OH, YES, WHILE JONATHAN WAS TAKING US AND AROUND SHOWING THE EVIDENCE, HE TOLD US

ON SEVERAL OCCASIONS DURING THAT DAY, THAT YES, HE WAS UNDER THE INFLUENCE OF ALCOHOL OR DRUGS. THE SAME FACTOR WHICH TRIGGERS THIS DISSOCIATIVE STATE.

NOW, WHAT ABOUT THE SEXUAL ABUSE? THAT'S ANOTHER DISPUTED AREA, OBVIOUSLY. DICK BOYLE, A SOCIAL WORKER THAT CAME IN HERE AND TESTIFIED YESTERDAY IS RETIRED AND A LIEUTENANT COMMANDER IN THE NAVY. HE WORKED HIMSELF UP [Tr. 2071] THROUGH THE RANKS. FROM – I DON'T KNOW WHAT THEIR LOWEST RANK IS IN THE NAVY. IT WOULD BE A PRIVATE IN THE ARMY. BUT HE WORKED HIS WAY UP THROUGH IN THE RANKS TO BECOME AN OFFICER IN THE NAVY. HE HAS SEVERAL YEARS OF SOCIAL EXPERIENCE. HE'S LICENSED IN TWO STATES. HE IS IMMINENTLY QUALIFIED ALL FOR HIS OPINION ON THE SEXUAL ABUSE AND HISTORY IN THE FAMILY. AND, I SUBMIT TO YOU, LADIES AND GENTLEMEN OF THE JURY, HE WOULD NOT PUT HIS INTEGRITY AND HE WOULD NOT PUT HIS CAREER ON THE LINE BY COMING UP HERE AND TELLING SOMETHING TO YOU THAT HE DIDN'T FULLY BELIEVE IN. AND THE SAME THING WITH DR. EVANS WHO HAS LIVED IN THIS TOWN FOR 20 SOMETHING YEARS NOW. HE BELIEVES THAT THE SEXUAL ABUSE OCCURRED AND HE BELIEVES THAT BASED ON HIS THIRTY YEARS EXPERIENCE AND PSYCHOLOGICAL EVALUATION, THAT THE SEXUAL ABUSE OCCURRED. BUT NOT ONLY DOES HE BELIEVE IT FOR THAT REASON BUT HE CONFIRMED IT WITH A SIMPLE TEST OF THE RORSCHACH PROCEDURE OR

THE RORSCHACH TEST. AND THIS IS NOT A TEST – THIS IS A TEST THAT THE STATE HOSPITAL DIDN'T PERFORM EITHER. THE STATE HOSPITAL NEVER GAVE HIM THE RORSCHACH TEST. DR. EVANS SAID THAT THE RESULTS OF THE RORSCHACH, THE RESULTS OF THAT OBJECTIVE TEST WERE COMMENSURATE WITH SEXUAL ABUSE. IT'S INTERESTING TO KNOW THAT WHEN DR. ELLISON AND DR. MCKEE, THE STATE HOSPITAL'S EMPLOYEES, THEY WORK FOR THE STATE, IT'S INTERESTING TO NOTE WHEN THEY GOT ON THE STAND THEY DIDN'T EVEN TO [sic] ATTEMPT [Tr. 2072] TO DISPUTE THAT JONATHAN WAS SEXUALLY ABUSED. THEY DIDN'T EVEN OFFER AN OPINION ON THAT ISSUE. THEIR REPORTS DON'T EVEN SHOW THAT THEY ADDRESSED THE AREA. THEY DIDN'T EVEN INQUIRE INTO THE AREA OF SEXUAL ABUSE WHEN HE STAYED AT THE STATE HOSPITAL FOR TWO WEEKS LAST SUMMER.

WHAT WE HAVE DONE IS DICK BOYLE HAS SPENT 70 HOURS WORKING ON THIS CASE, COMPILING A SOCIAL HISTORY OF THE FAMILY. SEVENTY HOURS. THE STATE HOSPITAL HAD A SOCIAL WORKER INTERVIEW JONATHAN FOR AN HOUR AND INTERVIEW HIS MOTHER FOR AN HOUR AND FROM THAT, THEY COMPILE A SOCIAL HISTORY, A SOCIAL HISTORY THAT DIDN'T EVEN INQUIRE OF ANY SEXUAL ABUSE. WE HAVE PRESENTED FIRST-PERSON ACCOUNTS OF SEXUAL ABUSE FROM THIS FAMILY. WE HAVE ROBIN SIMMONS ON THE STAND TESTIFYING ABOUT THE ABUSE FROM HER FATHER. DICK BOYLE WENT OUT AND INTERVIEWED FAMILY

MEMBERS WHO RECOUNTED TO HIM FIRST-HAND ACCOUNTS OF SEXUAL ABUSE.

I SUBMIT TO YOU, LADIES AND GENTLEMEN OF THE JURY, THAT WHERE YOU HAVE SMOKE, THERE'S FIRE AND ALTHOUGH THERE'S NO DIRECT EVIDENCE THAT ESTELLE SIMMONS SEXUALLY ABUSED JONATHAN, THE SMOKE IS THERE, THE HISTORY IS IN THE FAMILY AND JONATHAN SIMMONS WAS SEXUALLY ABUSED.

FINALLY, THE BIGGEST ITEM IN DISPUTE, I GUESS, IS THE ULTIMATE DIAGNOSIS OF DR. EVANS, THE DISSOCIATIVE DISORDER. THERE ARE THREE COMPONENTS AS I UNDERSTAND IT COMING FROM THE WITNESS STAND. I'LL BREAK IT DOWN INTO [Tr. 2073] THREE. THERE MAY BE MORE, BUT THERE ARE AT LEAST THREE COMPONENTS THAT YOU DO WHEN MAKING A PSYCHOLOGICAL OR A PSYCHIATRIC EVALUATION OF SOMEONE.

THE FIRST COMPONENT IS YOU INTERVIEW THE SUBJECT. THE SECOND COMPONENT IS YOU PERFORM CERTAIN TESTS AND THE THIRD COMPONENT IS YOU COMPILE A SOCIAL HISTORY. DR. EVANS INTERVIEWED JONATHAN SIMMONS, HE SAYS, ON THREE OCCASIONS. THOSE INTERVIEWS EACH LASTED OVER TWO HOURS. HE WAS WITH JONATHAN SIMMONS PROBABLY – I DON'T KNOW, A TOTAL OF EIGHT TO TEN HOURS. DR. MCKEE SAW HIM A TOTAL OF THREE HOURS AT THE STATE HOSPITAL. DR. ELLISON SAW HIM AN HOUR. MAYBE THEIR SOCIAL WORKER INTERVIEWED JONATHAN

AND HIS MOTHER FOR THREE HOURS. SHE CERTAINLY DIDN'T SPEND 70 HOURS COMPILING A SOCIAL HISTORY AS DICK BOYLE DID. SO, THE INTERVIEW PROCESS USED BY THE STATE HOSPITAL OR THE FIRST COMPONENT OF ESTABLISHING A PSYCHOLOGICAL PROFILE OR ASSESSMENT IS SUBSTANTIALLY LESS THAN THAT USED BY DR. EVANS. THE TEST – I HAVE ALREADY TOLD YOU ABOUT. THEY DIDN'T PERFORM THE MAJOR TEST, THE DISSOCIATION TEST. THEY DIDN'T EVEN CONSIDER IT AND NOT ONLY DID THEY NOT – IN ADDITION TO THE FACT THAT DR. EVANS GAVE THE DISSOCIATION TEST, HE ALSO GOT CONFIRMING DATA BY GIVING A QUESTIONNAIRE TO THE FAMILY. AND THEN, OF COURSE, THE SOCIAL HISTORY I HAVE ALREADY COMMENTED ON. SO, EACH OF THE THREE BASES ON WHICH YOU WOULD MAKE A PSYCHOLOGICAL ASSESSMENT, DR. EVANS WAS [Tr. 2074] PROVIDED WITH ADDITIONAL INFORMATION, MORE INFORMATION AND BETTER TESTING TO MAKE HIS EVALUATION. THE SOCIAL HISTORY AND BEHAVIOR IN THIS CASE PROVED THE DIAGNOSIS OF THE DISSOCIATIVE DISORDER. ALL OF THE CAUSES ARE PRESENT. THE SEXUAL ABUSE AND THE PHYSICAL ABUSE AND THE DYSFUNCTIONAL FAMILY. THE SYMPTOMS WERE PRESENT. THE TRANCE-LIKE STATES. THE LACK OF MEMORY AND THE ABNORMAL CONDUCT WHEN FACED WITH THE STRESSORS THAT MIGHT BRING ON THE DISSOCIATIVE DISORDER AND THEN YOU COMBINE THAT WITH THE ALCOHOL AND DRUGS AND WHAT YOU'VE DONE IS TRIGGER THE DISSOCIATE STATE.

WHAT IS INTERESTING AND COMPELLING, LADIES AND GENTLEMEN OF THE JURY AND MR. FOREMAN, IS THAT EVERY INCIDENT OF VIOLENT OR ABNORMAL CONDUCT IN WHICH MR. SIMMONS ENGAGED WAS EITHER DIRECTED AT HIS FATHER'S PROPERTY AND HIS FATHER WAS ONE WHO HAD BEATEN HIM WITH THE FAN BELT, REGULARLY BEAT HIM SEVERAL TIMES A WEEK OR IT WAS DIRECTED AT ELDERLY WOMEN AFTER HE WAS SEXUALLY ABUSED BY HIS GRANDMOTHER. IS HE DANGEROUS? DOCTOR EVANS SAID HE WAS DANGEROUS. BUT IS HE DANGEROUS WHEN HE IS AWAY FROM THESE STRESSORS THAT PROMOTE THE DISSOCIATIVE BEHAVIOR AND, OF COURSE, IS HE TREATABLE. THAT'S EVEN ANOTHER ISSUE. BUT IS HE DANGEROUS? HE'S NOT GOING TO BE DANGEROUS IN A PRISON SETTING. HE'S NOT GOING TO BE EXPOSED TO WOMEN. HE'S NOT GOING TO BE EXPOSED TO HIS FATHER. HE'S GOING TO BE PUT IN AN ENVIRONMENT WHERE HE'S NOT GOING TO BE [Tr. 2075] DANGEROUS.

LADIES AND GENTLEMEN OF THE JURY, MRS. SHEALY WILL ADDRESS YOU MOMENTARILY. I'M ABOUT TO WRAP UP. BUT I POSE THE FOLLOWING QUESTION TO YOU AND THIS COMES ALONG WITH MR. HARPOOTLIAN'S THEME ABOUT BEING SO DEVOID OF SOCIAL CONSCIENCE. HE SAID THAT SEVERAL TIMES. WOULD ANYONE ACT THIS WAY UNLESS HE OR SHE WERE SICK? HE HAS A MENTAL DISORDER. THE TECHNICAL NAME FOR IT IS NONSPECIFIC DISSOCIATIVE DISORDER. THE ANSWER IS, OBVIOUSLY, NO, YOU DO NOT ACT THIS WAY

UNLESS YOU DO HAVE A MENTAL CONDITION, YOU DO HAVE A MENTAL ILLNESS. AND IF YOU HAVE ANY DOUBT ABOUT IT, IF THERE'S ANY DOUBT ABOUT IT AT ALL IN YOUR MINDS, YOU MUST RESOLVE THAT DOUBT IN THE FAVOR OF JONATHAN SIMMONS. THAT'S THE LAW AS HIS HONOR WILL CHARGE YOU.

LADIES AND GENTLEMEN, THE PLACES I WAS RAISED AND THE PLACES I GO WHEN SOMEBODY IS SICK, YOU TREAT THEM. WHEN SOMEBODY'S INTELLIGENCE IS BORDERLINE AND IT MAKES THEM UNABLE TO COPE WITH THEIR SICKNESS, YOU DON'T CONDEMN THEM TO DEATH. AND WHEN SOMEBODY FROM THE TIME THEY WERE THAT SIZE WAS KNOWN TO THEIR FAMILY TO HAVE MENTAL PROBLEMS AND NOT BE ABLE TO FUNCTION PROPERLY IN SOCIETY AND THAT FAMILY NEVER CAME TO GIVE HIM ANY ASSISTANCE, YOU DON'T CONDEMN THOSE TYPE OF PEOPLE TO DEATH.

PLEASE, LADIES AND GENTLEMEN OF THE JURY, MR. FOREMAN, RETURN A VERDICT OF INCARCERATION FOR LIFE FOR [Tr. 2076] JONATHAN DALE SIMMONS.

THE COURT: MRS. JENNIFER KNEECE SHEALY.

MRS. SHEALY: MAY IT PLEASE THE COURT? MR. FOREMAN, LADIES AND GENTLEMEN OF THE JURY, AS I STAND BEFORE YOU TODAY TO ASK FOR A YOUNG MAN'S LIFE, I AM SCARED TO DEATH. MY HEART IS IN MY THROAT. AND I LOOK OUT AT EACH OF YOU WHOSE FACES HAVE BECOME SO

FAMILIAR. MOST OF YOU ARE THE ONE I QUESTIONED WHEN WE WENT THROUGH THE SELECTION PROCESS AND I REALIZE TODAY YOU ARE GONG TO BE ASKED TO MAKE THE MOST IMPORTANT DECISION OF YOUR LIFE BECAUSE IF YOU DECIDE THAT JONATHAN SIMMONS LIVES, HE LIVES; AND IF YOU DECIDE THAT JONATHAN SIMMONS DIES, HE DIES.

MR. HARPOOTLIAN HELD UP THE BIBLE AND REMINDED YOU THAT YOU EACH SAID THAT YOU COULD GIVE DEATH IN THE PROPER CIRCUMSTANCES. BUT I ASK YOU TO REMEMBER THAT YOU ALSO SAID YOU WOULD CONSIDER MITIGATING CIRCUMSTANCES IN MAKING THAT DECISION AND THAT IS WHAT MR. BUNCH HAS REMINDED YOU OF JUST A MINUTE AGO AND THAT IS WHAT I ASK YOU TO THINK ABOUT AS WELL. EVERY CASE WHERE SOMEONE IS CONVICTED OF MURDER WITH AN AGGRAVATING CIRCUMSTANCE IS NOT A PROPER CASE FOR A DEATH PENALTY. THAT DECISION IS LEFT UP TO THE JURY. TO EACH OF YOU. YOU EACH MUST CALL UPON YOUR CONSCIENCE AND YOUR HEART IN MAKING THAT DECISION. AND I ASK THAT YOU RECALL ALL OF THE TESTIMONY THAT WE [Tr. 2077] PRESENTED YESTERDAY AND THAT YOU CONSIDER THAT. YOU HEARD ABOUT THE SIMMONS FAMILY. YOU HEARD ABOUT FROM THE TIME THAT JONATHAN SIMMONS WAS AN INFANT, HE WAS BEATEN BY HIS FATHER. HE WAS NEVER LOVED BY HIS FATHER. MR. HARPOOTLIAN TRIES TO DISMISS THAT. HOW CAN YOU DISMISS THAT? ON FATHER'S DAY I THOUGHT OF JONATHAN

SIMMONS. MY HUSBAND GAVE THE CHILDREN'S SERMON AT OUR CHURCH AND WITH THE LITTLE CHILDREN PRESENT, HE BROUGHT DOWN THINGS TO SHOW THEM THAT REMINDED HIM OF HIS FATHER. A RAKE, A BAT, A GLOVE, SOME TOOLS AND A FISHING – FISHING – STICK. AND HE TOLD THE LITTLE CHILDREN OF THE CHURCH AND THE CONGREGATION THAT HIS FATHER TAUGHT HIM TO PLAY BALL AND HIS FATHER PLAYED CATCH AND THEY WENT FISHING. AND HE TAUGHT HIM TO BUILD THINGS. JONATHAN SIMMONS' FATHER DIDN'T TEACH HIM ANY OF THOSE THINGS. WHAT WOULD JONATHAN SIMMONS SHOW YOU? A COMB? A SWITCH? A LEMON? A FAN BELT? AND MY HUSBAND ALSO SHOWED THE CHILDREN A BOX OF BAND-AIDS AND SAID WHEN HIS DADDY FOUND OUT HE WAS HURT, HE WOULD MEND HIM. JONATHAN SIMMONS' FATHER CAUSED THE NEED FOR THE BAND-AID AND SAID THAT WHEN HIS DADDY FOUND OUT HE WAS HURT, HE MENDED HIM. JOHNATHAN SIMMONS' FATHER CAUSED THE NEED FOR THE BAND-AIDS AND WOULDN'T LET HIM TO [sic] GO TO THE DOCTOR. YOU CANNOT FORGET THAT WHEN YOU GO BACK TO THE JURY ROOM.

THE ONE THING MY HUSBAND AND I WANT MORE THAN [Tr. 2078] ANYTHING IS CHILDREN. CHILDREN TO LOVE, TO HUG, TO NURTURE. JONATHAN SIMMONS' FATHER NEVER DID THAT TO HIM. YOU HEARD THE TESTIMONY OF ROBIN. YOU HEARD THE TESTIMONY OF BARBARA AND OF WILLIE. THERE WAS NO LOVE IN THAT HOME ON THE PART OF THE FATHER. HE WAS ABUSIVE. HE

BEAT THEM. HE TOOK THEM NOWHERE. THAT FAMILY PLAYED NO GAMES BUT THEY PLAYED HIDE. THEY PLAYED HIDE FROM DADDY WHEN HE COMES HOME FROM WORK. THEY PLAYED HIDE THE WAY OUR FAMILY IS FROM EVERYBODY ELSE. AND DR. EVANS AND MR. BOYLE EXPLAINED TO YOU JONATHAN'S BEEN PLAYING HIDE FOR YEARS. YOU MUST CONSIDER THAT. AND AMMIE MURRAY AND ELLOISE DOYLE AND TOME TURNIPSEED, THEIR TESTIMONY IS VERY IMPORTANT BECAUSE THEY SAW JONATHAN. THEY ARE NON-FAMILY MEMBERS AND THEY SAW JONATHAN AND THEY KNOW THAT HE HAS THE ABILITY TO BE KIND, TO BE GENTLE, TO HELP A CHURCH THAT HAD BEEN RUINED AND THEY THOUGHT ENOUGH OF HIM THEN TO COME INTO COURT YESTERDAY AND ASK YOU FOR MERCY.

MR. HARPOOTLIAN WANT TO FOCUS ALL OF YOUR ATTENTION ON THE AGGRAVATION PART OF THIS SECOND PART OF THE TRIAL, BUT THAT'S NOT PROPER. YOU MUST CONSIDER THE MITIGATION. YOU MUST CONSIDER THE PEOPLE WHO CAME IN HERE AND ASKED YOU FOR MERCY FOR JONATHAN. THEY ASKED YOU FOR MERCY.

AND MR. HARPOOTLIAN THINKS WE ARE TELLING YOU DON'T BLAME JONATHAN, DON'T BLAME JONATHAN. WE ARE NOT [Tr. 2079] ASKING YOU THAT. YOUR CHOICE IS IN WHAT WAY IS HE GOING TO BE PUNISHED. THAT IS YOUR CHOICE. NOT THAT HE WILL NOT BE PUNISHED. AND I WOULD SUBMIT TO YOU HE IS 22 YEARS-OLD. A LIFE SENTENCE IS PUNISHMENT.

IN ENGLAND, MANY YEARS AGO WHEN THE PEOPLE IN THE LANDS WOULD HEAR THE BELLS OF THE CHURCH RING, THEY TOLLED, THEY KNEW SOMEONE HAD DIED. AND AN ENGLISH PREACHER AND POET JOHN DONNE WHEN TALKING ABOUT THE EFFECTS OF DEATH ON EACH OF US WROTE EVERY MAN'S DEATH DIMINISHES ME BECAUSE I AM INVOLVED IN MANKIND. SO SAY NOT TO ASK ~~FOR~~ WHOM THE BELLS TOLL. THEY TOLD [sic] FOR THEE.

JONATHAN SIMMONS, IF YOU WERE TO DECIDE ON THE DEATH PENALTY, WILL DIE AND HIS DEATH WILL AFFECT MANY. I HAVE WORKED ON THIS CASE FOR MONTHS AND THERE IS NO QUESTION THAT THIS IS A SAD, SAD CASE. IT IS SAD FOR ALL OF THE VICTIMS AND ALL THEIR FAMILIES AND IT IS SAD FOR THE SIMMONS. AND WHAT YOU MUST REALIZE IS THAT NOTHING YOU WILL DO WILL BRING JOSIE LAMB BACK AND NOTHING YOU WILL DO WILL MEND THE VICTIMS. IT IS TIME FOR THE SUFFERING IN THIS CASE TO END.

AND IF YOU CHOOSE TO – A DEATH SENTENCE FOR JONATHAN SIMMONS, THE SUFFERING WILL CONTINUE. I ASK THAT WHEN YOU GO BACK INTO THE JURY ROOM THAT YOU THINK ABOUT BARBARA AND THINK ABOUT ROBIN AND THINK ABOUT WILLIE. THIS SITUATION REMINDS OF A RECENT QUOTATION I READ FROM THE [Tr. 2080] REVEREND CHARLES ALLEN WHO SAID WHEN SOMEONE SAYS A SITUATION OR A PERSON IS HOPELESS, THEY SLAM THE DOOR IN THE FACE OF

GOD. THE SUFFERING MUST END. THINK OF MICHAEL.

* * *

[THE COURT:] JURORS, PLEASE, PLEASE, PLEASE, GIVE ME YOU ATTENTION NOW AS I CHARGE YOU THE LAW.

THE DEFENDANT IN THIS TRIAL HAS NOT TESTIFIED. THIS IS HIS CONSTITUTIONAL RIGHT AND IT IS NOT A CIRCUMSTANCE THAT YOU CAN TAKE INTO CONSIDERATION OR EVEN ALLOW TO ENTER INTO YOUR DISCUSSION IN THE JURY ROOM.

UNDER THE CONSTITUTION OF SOUTH CAROLINA AND UNDER THE UNITED STATES CONSTITUTION, IT IS HIS [Tr. 2081] CONSTITUTIONAL RIGHT NOT TO TESTIFY. THE FACT THAT THE DEFENDANT DID NOT TAKE THE WITNESS STAND AND TESTIFY IN HIS OWN BEHALF DOES NOT CREATE ANY INFERENCE AGAINST HIM. THE JURY MUST NOT PERMIT THAT FACT TO WEIGH IN THE SLIGHTEST DEGREE AGAINST THIS DEFENDANT. NOR SHOULD THIS FACT ENTER INTO THE DISCUSSION OR DELIBERATION OF THE JURY. I REPEAT AGAIN, THIS IS A CONSTITUTIONAL MATTER. NO JUROR SHOULD MAKE ANY COMMENT UPON THAT MATTER IN THE JURY ROOM.

THE COURT GENERALLY DETERMINES THE ADMISSIBILITY OF EVIDENCE. I INSTRUCT YOU THAT AS REGARDS ANY ALLEGED STATEMENT MADE BY THE DEFENDANT, THAT YOU, MEMBERS

OF THE JURY, MAKE THE ULTIMATE DETERMINATION OF WHETHER OR NOT THE DEFENDANT MADE THE SAID STATEMENT AND, IF HE DID MAKE THE STATEMENT, WHETHER THE STATEMENT WAS MADE BY THE DEFENDANT VOLUNTARILY AND OF HIS OWN FREE WILL AND ACCORD. AND FINALLY, JUST WHAT WEIGHT, IF ANY, SHOULD BE GIVEN TO ANY STATEMENT MADE BY THE DEFENDANT.

I CHARGE YOU THAT YOU MUST DETERMINE IF THE ALLEGED STATEMENT WAS THE PRODUCT OF AN ESSENTIALLY FREE AND UNCONSTRAINED CHOICE BY ITS MAKER. IF YOU DETERMINE IT WAS AND THE BURDEN IS UPON THE STATE TO PROVE THIS FACT AS ALL OTHER FACTS BEYOND A REASONABLE DOUBT, THEN YOU MAY GIVE THE STATEMENT SUCH FURTHER CONSIDERATION AS YOU DEEM PROPER. IF YOU DETERMINE THE ALLEGED STATEMENT WAS NOT THE FREE AND VOLUNTARY-WILLED EXPRESSION OF THE DEFENDANT, THEN [Tr. 2082] YOU SHOULD NOT CONSIDER THE STATEMENT AT ALL.

IN DETERMINING WHETHER A DEFENDANT'S WILL WAS OVERCOME IN OBTAINING A STATEMENT YOU SHOULD CONSIDER THE CHARACTERISTICS OF THE ACCUSED AND THE DETAILS OF THE INTERROGATION REFERRED TO IN THE LAW AS THE TOTALITY OF THE CIRCUMSTANCES. SOME OF THE FACTORS THAT YOU MUST CONSIDER ARE: THE AGE OF THE DEFENDANT; HIS EDUCATION OR LACK THEREOF; HIS BACKGROUND AND ENVIRONMENT; HIS MENTAL ABILITY OR CAPACITY; HIS I. Q. OR INTELLIGENCE; THE ADVICE OR LACK THEREOF TO

THE ACCUSED OF HIS CONSTITUTIONAL RIGHTS INCLUDING BUT NOT LIMITED TO THE MIRANDA WARNINGS CONCERNING THE RIGHT TO REMAIN SILENT; THAT A STATEMENT COULD BE USED AGAINST HIM IN A COURT OF LAW; THE RIGHT TO HAVE A LAWYER. IF HE COULD NOT AFFORD A LAWYER, A LAWYER WOULD BE APPOINTED WITHOUT ANY COST TO HIM AND THAT HE COULD STOP MAKING A STATEMENT AT ANY TIME. OTHER FACTORS TO CONSIDER ARE THE PLACE AND LENGTH OF DETENTION AND THE NATURE OF THE QUESTIONING.

YOU, THE JURY, MUST CAREFULLY SCRUTINIZE ALL OF THE SURROUNDING CIRCUMSTANCES BEFORE YOU GIVE ANY WEIGHT TO ANY ALLEGED STATEMENT MADE BY THE DEFENDANT. YOU MUST BE SATISFIED BEYOND A REASONABLE DOUBT THAT THE STATEMENT WAS MADE BY THE ACCUSED UNINFLUENCED BY PROMISE OF REWARD, THREAT OF INJURY OR DIMINUTION OF HIS RIGHTS.

MR. FOREMAN AND MEMBERS OF THE JURY, THE [Tr. 2083] DEFENDANT, JONATHAN DALE SIMMONS, HAS BEEN FOUND GUILTY OF MURDER. IT IS YOUR DUTY AND RESPONSIBILITY TO DETERMINE WHAT SENTENCE YOU WILL IMPOSE UPON THE DEFENDANT FOR THE OFFENSE OF MURDER. YOU MUST NOW DECIDE WHETHER TO SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT OR TO DEATH WHICH IS, IN THIS STATE, BY ELECTROCUTION.

IN ARRIVING AT YOUR SENTENCE, YOU MUST CONSIDER ANY STATUTORY EXTENUATING OR MITIGATING CIRCUMSTANCES AND YOU MUST CONSIDER ANY EXTENUATING OR MITIGATING CIRCUMSTANCES OF ANY NATURE WHATSOEVER AS SHOWN BY THE EVIDENCE.

YOU MAY CONSIDER THE STATUTORY AGGRAVATING CIRCUMSTANCES WHICH IS PROVEN BY THE STATE BEYOND A REASONABLE DOUBT. I INSTRUCT YOU THAT IN ARRIVING AT YOUR DECISION, YOU MUST FIRST DETERMINE FROM THE EVIDENCE WHICH WAS OFFERED AT THE TRIAL AND DURING THE SENTENCING PROCEEDING WHETHER THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED BEYOND EVERY REASONABLE DOUBT AT THE TIME THE VICTIM IN THIS CASE WAS MURDERED.

WHAT DO I MEAN BY THE TERM STATUTORY AGGRAVATING CIRCUMSTANCE? MR. FOREMAN AND MEMBERS OF THE JURY, A STATUTORY AGGRAVATING CIRCUMSTANCE IS A FACT, AN INCIDENT A DETAIL OR AN OCCURRENCE WHICH THE GENERAL ASSEMBLY, THE LEGISLATURE OF THIS STATE, HAS DECLARED BY STATUTE WOULD MAKE WORSE, THAT IS, AGGRAVATE THE OFFENSE OF MURDER WHEN [Tr. 2084] THAT FACT, INCIDENT, DETAIL OR OCCURRENCE ACCOMPANIES AN ACT OF MURDER.

A STATUTORY AGGRAVATING CIRCUMSTANCE IS ONE RECOGNIZED BY THE STATUTE AS A CIRCUMSTANCE WHICH INCREASES THE ENORMITY OF THE

OFFENSE OR A CIRCUMSTANCE WHICH ADDS TO THE INJURIOUS CONSEQUENCES OF THE OFFENSE.

BEFORE YOU CAN IMPOSE THE DEATH SENTENCE UPON THE DEFENDANT, ALL TWELVE OF YOU MUST AGREE BEYOND EVERY REASONABLE DOUBT THAT THE EVIDENCE DISCLOSES THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE. UNLESS YOU, THE JURY, UNANIMOUSLY, ALL TWELVE FIND BEYOND A REASONABLE DOUBT THAT THE EVIDENCE DISCLOSES THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE, YOU CANNOT SENTENCE THE DEFENDANT TO DEATH.

WHAT STATUTORY AGGRAVATING CIRCUMSTANCE MAY YOU CONSIDER? WHAT STATUTORY AGGRAVATING CIRCUMSTANCE DOES THE STATE ALLEGE EXISTED HERE BEYOND EVERY REASONABLE DOUBT AT THE TIME THE MURDER WAS COMMITTED? THE STATUTORY AGGRAVATING CIRCUMSTANCE WHICH YOU MAY CONSIDER IN DETERMINING THE DEFENDANT'S SENTENCE IS BURGLARY IN THE FIRST DEGREE.

SECTION 17-11-311 OF THE CODE OF LAWS AS PASSED BY THE GENERAL ASSEMBLY PROVIDES, BURGLARY FIRST DEGREE: "A PERSON IS GUILTY OF BURGLARY IN THE FIRST DEGREE IF THE PERSON ENTERS A DWELLING WITHOUT CONSENT AND WITH INTENT TO [Tr. 2085] COMMIT A CRIME THEREIN AND EITHER, WHEN IN EFFECTING ENTRY OR WHILE IN THE DWELLING, CAUSES PHYSICAL

INJURY TO ANY PERSON OR THE ENTERING OR REMAINING OCCURS IN THE NIGHT TIME".

SECTION 16-11-310 PROVIDES, "DWELLING MEANS ITS DEFINITION FOUND IN SECTION 16-11-10 AND ALSO MEANS THE LIVING QUARTERS OF A BUILDING WHICH IS USED OR NORMALLY USED FOR SLEEPING, LIVING OR LODGING BY A PERSON".

SECTION 16-11-10 PROVIDES, "WITH RESPECT TO THE CRIME OF BURGLARY, ANY HOUSE IN WHICH THERE SLEEPS A PROPRIETOR OR A PERSON WHO LODGES THERE WITH A VIEW TO THE PROTECTION OF PROPERTY SHALL BE DEEMED A DWELLING HOUSE OF".

UNDER THE LAW, THE STATE MUST PROVE BEYOND A REASONABLE DOUBT, THESE FACTORS. THERE MUST BE AN ENTERING. THE STATE MUST PROVE THAT THERE WAS AN ENTERING. THAT IS, THE PERSON CHARGED ACTUALLY WENT INSIDE OF THE DWELLING. IT MUST BE A DWELLING HOUSE. I HAVE DEFINED FOR YOU THE STATUTORY PROVISIONS IN REGARD TO A DWELLING HOUSE. IT MUST BE EITHER IN THE NIGHTTIME OR THE DEFENDANT CAUSED PHYSICAL INJURY TO ANY PERSON. EITHER ONE IS SUFFICIENT. FINALLY, THERE MUST BE AN INTENT TO COMMIT A CRIME THEREIN WHETHER THE CRIME IS COMMITTED OR NOT.

I CHARGE YOU THAT THE MERE ENTERING INTO A DWELLING HOUSE IS NOT A VIOLATION OF THIS SECTION. IT IS [Tr. 2086] ONLY WHERE THERE IS AN ENTERING WITH THE INTENT TO COMMIT A CRIME THAT THE OFFENSE OF BURGLARY IS COMPLETE.

THE ENTRY MUST BE CARRIED OUT WITH THE INTENT TO COMMIT A CRIME. PROOF OF INTENT NECESSARILY RESTS ON INFERENCE FROM CONDUCT. TO CONSTITUTE BURGLARY IN THE FIRST DEGREE, THE ENTERING MUST BE WITH THE INTENT TO COMMIT A CRIME THEREIN AND IT IS ESSENTIAL THAT THE FELONIOUS INTENT EXIST AT THE TIME OF THE ENTERING AND IT IS NOT SUFFICIENT THAT THE FELONIOUS INTENT IS FORMED AFTER THE ENTRY.

IN THIS CASE, THE STATE HAS PRESENTED EVIDENCE OF OTHER CRIMES. PLEASE, PLEASE, GIVE ME YOUR ATTENTION. THESE CRIMES MAY NOT BE USED TO PROVE A STATUTORY AGGRAVATING CIRCUMSTANCES [sic]. THESE CRIMES MAY NOT BE USED TO PROVE A STATUTORY AGGRAVATING CIRCUMSTANCE.

I CHARGE YOU THAT THE EVIDENCE OF OTHER CRIMES, THESE OTHER OFFENSES, SHOULD NOT BE CONSIDERED AS SUBSTANTIVE EVIDENCE OF A [sic] AGGRAVATING CIRCUMSTANCE. BUT IF YOU ARE CONVINCED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT COMMITTED THESE OTHER CRIMES OR THESE OTHER OFFENSES OR ANY OF THEM, YOU MAY CONSIDER THESE CRIMES OR OTHER OFFENSES AS EVIDENCE OF THE DEFENDANT'S CHARACTER AND HIS CHARACTERISTICS AS THEY MAY BEAR LOGICAL RELEVANCE TO THE CRIME. THESE MAY BE CONSIDERED ALONG WITH ALL OF THE OTHER EVIDENCE AND YOU MAY GIVE THEM WHATEVER WEIGHT YOU DEEM PROPER UNDER THE CIRCUMSTANCES OF THIS CASE.

[Tr. 2087] THE STATUTORY AGGRAVATING CIRCUMSTANCE WHICH YOU ARE AUTHORIZED TO CONSIDER IN THIS CASE HAS BEEN TYPED ON A SHEET OF PAPER THAT I HOLD IN MY HAND. IT IS ENTITLED STATUTORY INSTRUCTIONS. YOU WILL HAVE THAT DOCUMENT WITH YOU IN THE JURY ROOM IN YOUR DELIBERATIONS. IT IS SIGNED BY THIS COURT UNDER THE LAW. IN THE EVENT, THEREFORE, THAT YOU UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED AT THE TIME THE VICTIM IN THIS CASE WAS MURDERED, THEN YOU WOULD BE AUTHORIZED TO IMPOSE THE DEATH SENTENCE UPON THE DEFENDANT. SHOULD YOU DETERMINE THAT THE IDENTIFIED STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED AT THE TIME THE MURDER WAS COMMITTED AND SHOULD YOU UNANIMOUSLY DECIDE THAT THE SENTENCE OF DEATH BE IMPOSED UPON THE DEFENDANT, THEN YOU ARE REQUIRED TO SPECIFY IN WRITING IN YOUR VERDICT FORM THE STATUTORY AGGRAVATING CIRCUMSTANCE THAT YOU FOUND TO EXIST BEYOND EVERY REASONABLE DOUBT.

PLEASE NOTE THAT IN THE FORM OF SENTENCE, THERE IS A SPACE PROVIDED. IF YOU SO FIND THAT THERE WAS A STATUTORY AGGRAVATING CIRCUMSTANCE, THERE IS A SPACE PROVIDED WHERE YOU WILL WRITE OUT THAT YOU FOUND THE STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND EVERY REASONABLE DOUBT.

AGAIN, AS TO THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE, SHOULD YOU NOT FIND BEYOND EVERY REASONABLE [Tr. 2088] DOUBT THAT THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED AT THE TIME THE MURDER IN THIS CASE OCCURRED, THEN YOU WOULD NOT BE AUTHORIZED TO IMPOSE THE DEATH SENTENCE AND IN THAT EVENT, YOUR SENTENCE MUST BE LIFE IMPRISONMENT. FOR THAT MATTER, YOU CAN DECIDE THAT THE DEFENDANT BE SENTENCED TO LIFE IMPRISONMENT EVEN IF YOU UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED AT THE TIME THAT THE MURDER IN THIS CASE WAS COMMITTED.

IN ADDITION TO CONSIDERING THE STATUTORY AGGRAVATING CIRCUMSTANCE, YOU ARE REQUIRED BY THE LAW TO CONSIDER ANY STATUTORY MITIGATING CIRCUMSTANCES.

WHAT IS A STATUTORY MITIGATING CIRCUMSTANCE? A STATUTORY MITIGATING CIRCUMSTANCE IS A FACT, A DETAIL, AN INCIDENT OR AN OCCURRENCE WHICH THE GENERAL ASSEMBLY, THE LEGISLATURE OF THIS STATE HAS DECLARED BY STATUTE WOULD RENDER LESS SEVERE, THAT IS, MITIGATE THE OFFENSE OF MURDER WHEN THAT FACT, DETAIL, INCIDENT OR OCCURRENCE ACCOMPANIES THE ACT OF MURDER. A STATUTORY MITIGATING CIRCUMSTANCE IS ONE RECOGNIZED BY STATUTE, BY THE LAW AS A CIRCUMSTANCE WHICH IN FAIRNESS AND MERCY MAY BE CONSIDERED AS EXTENUATING OR AS REDUCING THE DEGREE OF

MORAL CULPABILITY FOR THE COMMISSION OF THE ACT OF MURDER. THE MITIGATING CIRCUMSTANCE THAT SHOULD BE NOTED WOULD NOT CONSTITUTE EITHER JUSTIFICATION OR EXCUSE FOR THE OFFENSE IN QUESTION. [Tr. 2089] SUCH A CIRCUMSTANCE WOULD SIMPLY LESSON [sic] ONE'S GUILT. THAT IS MAKE HIM LESS BLAMEWORTHY OR LESS CULPABLE. YOU ARE REQUIRED TO CONSIDER ANY MITIGATING CIRCUMSTANCE REGARDLESS OF WHETHER IT IS A STATUTORY MITIGATING CIRCUMSTANCE OF ANY NATURE THAT IS SUPPORTED BY THE EVIDENCE IN ADDITION TO THE STATUTORY MITIGATING CIRCUMSTANCES. BY THIS I MEAN THAT THE JURY IS REQUIRED UNDER THE LAW TO CONSIDER NOT ONLY STATUTORY MITIGATING CIRCUMSTANCES BUT ANY MITIGATING CIRCUMSTANCES OF ANY NATURE WHATSOEVER SUPPORTED BY THE EVIDENCE.

WHAT IS A GENERAL OR NON-STATUTORY MITIGATING CIRCUMSTANCE? IT IS CIRCUMSTANCE RECOGNIZED AS ONE WHICH, IN FAIRNESS AND MERCY, MAY BE CONSIDERED TO BE EXTENUATING. A MITIGATING CIRCUMSTANCE IS NEITHER JUSTIFICATION OR EXCUSE FOR THE MURDER. IT SIMPLY LESSENS THE SEVERITY OF THE PUNISHMENT BECAUSE OF ITS EXISTENCE. YOU ARE REQUIRED TO CONSIDER ANY CIRCUMSTANCE OF ANY NATURE WHATSOEVER RELATING TO THE CASE OR TO THE DEFENDANT, JONATHAN DALE SIMMONS, AS A REASON FOR NOT IMPOSING THE DEATH SENTENCE. ANY FACTOR MAY BE TAKEN INTO

ACCOUNT AS A REASON FOR NOT IMPOSING THE DEATH SENTENCE ON THE DEFENDANT.

I CHARGE YOU THAT YOU MAY NOT CONSIDER THE STATUTORY AGGRAVATING CIRCUMSTANCE ALLEGED BY THE STATE UNLESS ALL TWELVE OF YOU HAVE FOUND THAT THIS STATUTORY AGGRAVATING CIRCUMSTANCE HAS BEEN PROVEN BEYOND A [Tr. 2090] REASONABLE DOUBT. THE SAME IS NOT TRUE, HOWEVER FOR A MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES.

IN THE CASE OF A MITIGATING CIRCUMSTANCE OR MITIGATING CIRCUMSTANCES YOU NEED NOT UNANIMOUSLY AGREE ON THE EXISTENCE OF A MITIGATING CIRCUMSTANCE OR MITIGATING CIRCUMSTANCES. NOR MUST THE DEFENDANT PROVE ANY MITIGATING CIRCUMSTANCE BEFORE YOU MAY CONSIDER IT. RATHER, EACH MEMBER OF THE JURY MAY CONSIDER ANY MITIGATING CIRCUMSTANCE OR MITIGATING CIRCUMSTANCES WHICH HE OR SHE FEELS TO BE SUPPORTED BY THE EVIDENCE. BEFORE YOU CAN IMPOSE A LIFE SENTENCE, IT IS NOT NECESSARY – I REPEAT, IT IS NOT NECESSARY FOR YOU TO FIND THE EXISTENCE OF ANY STATUTORY MITIGATING CIRCUMSTANCE OR ANY NON-STATUTORY MITIGATING CIRCUMSTANCE OF ANY NATURE. THERE IS NO BURDEN UPON THE DEFENDANT TO PROVE A MITIGATING CIRCUMSTANCE OR MITIGATING CIRCUMSTANCES. BUT, RATHER, THE BURDEN IS UPON THE STATE TO PROVE THE AGGRAVATING CIRCUMSTANCE BEYOND EVERY REASONABLE DOUBT. THE BURDEN IS UPON THE JURY TO CONSIDER THE EVIDENCE

SUBMITTED AND DETERMINE WHETHER THE MITIGATING FACTOR OR FACTORS EXIST AND, IF SO, THE SIGNIFICANCE AND WEIGHT TO BE ACCORDED IT. I REPEAT AGAIN, FOR THE SAKE OF EMPHASIS AND CLARITY, THERE IS NO BURDEN UPON THE DEFENDANT TO PROVE A MITIGATING CIRCUMSTANCE OR MITIGATING CIRCUMSTANCES. WHILE IT IS NECESSARY FOR YOU TO FIND, BEYOND EVERY REASONABLE DOUBT, THE EXISTENCE OF THE ALLEGED [Tr. 2091] STATUTORY AGGRAVATING CIRCUMSTANCE BEFORE YOU CAN SENTENCE TO DEATH, IT IS NOT REQUIRED THAT YOU FIND THE EXISTENCE OF ANY STATUTORY MITIGATING CIRCUMSTANCE OR ANY MITIGATING CIRCUMSTANCE OF ANY NATURE IN ORDER TO DECIDE THAT THE DEFENDANT BE GIVEN LIFE IMPRISONMENT.

AS A MATTER OF FACT, YOU MAY DECIDE THAT THE DEFENDANT RECEIVE A LIFE SENTENCE IRRESPECTIVE OF WHETHER YOU FIND THE EXISTENCE IN THE EVIDENCE OF A STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCE OR NOT. YOU MAY CHOOSE TO IMPOSE LIFE IMPRISONMENT AS AN ACT OF MERCY. AS I SAY, HOWEVER, YOU MAY IMPOSE A LIFE SENTENCE WITHOUT FINDING THE EXISTENCE OF A STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCE. AND YOU MAY GIVE A LIFE SENTENCE EVEN SHOULD YOU FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE. SHOULD YOU NOT UNANIMOUSLY FIND,

BEYOND EVERY REASONABLE DOUBT, THE EXISTENCE IN THE RECORD OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE, YOUR SENTENCE WOULD BE LIFE IMPRISONMENT EVEN THOUGH THERE IS NO PROOF IN THE RECORD OF AN ALLEGED STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCE.

UNDER THE LAW AND UNDER THE CONSTITUTION, YOUR DECISION MUST BE UNANIMOUS. UNDER THE CONSTITUTION AND UNDER THE LAW, YOUR DECISION MUST BE UNANIMOUS. YOUR DECISION TO SENTENCE TO LIFE IMPRISONMENT MUST BE [Tr. 2092] UNANIMOUS. YOUR DECISION TO SENTENCE TO DEATH MUST BE UNANIMOUS. UNANIMITY IS MANDATED UNDER THE CONSTITUTION AND THE STATUTORY LAW OF THE STATE.

WHAT STATUTORY MITIGATING CIRCUMSTANCES MAY YOU PROPERLY CONSIDER HERE? WHAT STATUTORY MITIGATING CIRCUMSTANCES DOES THE DEFENDANT ALLEGE INVOLVED IN THE CASE? THE STATUTORY MITIGATING CIRCUMSTANCES THAT ARE INVOLVED HERE IN THIS CASE ARE AS FOLLOWS: THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF MENTAL OR EMOTIONAL DISTURBANCE. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED. THE AGE AND MENTALITY OF THE DEFENDANT AT THE TIME OF THE CRIME. THESE ARE STATUTORY MITIGATING CIRCUMSTANCES.

I HAVE HERETOFORE CHARGED YOU AND I REPEAT AGAIN FOR THE SAKE OF EMPHASIS, YOU ARE REQUIRED TO CONSIDER ANY MITIGATING CIRCUMSTANCE OF ANY NATURE, REGARDLESS OF WHETHER IT'S INCLUDED IN THE STATUTE, IF THE EVIDENCE PRESENTS THAT TO YOU. I REPEAT, AGAIN, YOU MUST CONSIDER ANY MITIGATING CIRCUMSTANCE OF ANY NATURE REGARDLESS OF WHETHER IT IS INCLUDED IN THE STATUTORY PRESENTATION.

I CHARGE YOU THAT IN THE EVENT YOU FIND THAT AN ALLEGED STATUTORY MITIGATING CIRCUMSTANCE EXISTED, IN FACT, AT THE TIME THE MURDER INVOLVED IN THIS CASE WAS COMMITTED, SUCH A FINDING WOULD NOT PRECLUDE YOU FROM ALSO FINDING, [Tr. 2093] BEYOND EVERY REASONABLE DOUBT, THE EXISTENCE AT THE TIME OF THE MURDER OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCES AND DECIDING THAT THE DEFENDANT BE SENTENCED TO DEATH. IN OTHER WORDS, THE EXISTENCE OF AN ALLEGED STATUTORY MITIGATING CIRCUMSTANCE IS NOT A BAR TO THE IMPOSITION OF THE DEATH SENTENCE. HOWEVER, PLEASE, PAY CLOSE ATTENTION, HOWEVER, THE NONEXISTENCE OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE IS A BAR TO THE IMPOSITION OF THE DEATH PENALTY.

REMEMBER YOU CANNOT IMPOSE A DEATH SENTENCE UNLESS YOU FIND, BEYOND EVERY REASONABLE DOUBT, THE EXISTENCE IN FACT OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE AT THE TIME OF THE MURDER. AS I HAVE

ALREADY INSTRUCTED YOU, YOU WILL WRITE OUT YOUR FINDING OF THE AGGRAVATING CIRCUMSTANCE FOUND, BEYOND A REASONABLE DOUBT, UNDER THE STATUTE. WHERE, AFTER CONSIDERING ALL THE EVIDENCE, YOU FIND, BEYOND EVERY REASONABLE DOUBT, THAT THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED AT THE TIME THE MURDER WAS COMMITTED, YOU MAY DECIDE THAT THE DEFENDANT BE SENTENCED TO DEATH EVEN SHOULD YOU ALSO FIND THAT THE ALLEGED STATUTORY MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES EXISTED AT THE TIME THE VICTIM WAS KILLED.

AN IMPORTANT FACTOR, AN ELEMENT THAT YOU MAY CONSIDER IF YOU SHOULD CONCLUDE THAT A STATUTORY AGGRAVATING CIRCUMSTANCE EXISTS IS WHETHER THE DEFENDANT [Tr. 2094] SHOULD BE SENTENCED TO LIFE IMPRISONMENT FOR ANY REASON OR NO REASON AT ALL. THIS IS WHAT IS CALLED IN THE LAW AS A FINDING OF MERCY AND IF SUCH SHOULD BE YOUR DECISION, YOU WILL INDICATE BY RETURNING TO THE COURT THE SENTENCE OF LIFE IMPRISONMENT IN THE CASE. YOU MUST KEEP IN MIND THAT A DECISION THAT THE DEFENDANT BE SENTENCED TO DEATH MUST BE UNANIMOUS AND A DECISION THAT THE DEFENDANT BE SENTENCED TO LIFE IMPRISONMENT MUST BE UNANIMOUS.

NOW, MEMBERS OF THE JURY, I GIVE TO YOU THE FORMS. PLEASE, PLEASE GIVE ME YOUR URGENT ATTENTION. MR. FOREMAN, PLEASE, LISTEN CAREFULLY NOW. YOU MUST SIGN THESE

FORMS ON BEHALF OF THE JURY. PLEASE, GIVE ME YOUR URGENT ATTENTION.

FIRST, I HAVE A SHEET CALLED STATUTORY INSTRUCTIONS. I HAVE SIGNED THIS AS THE PRESIDING JUDGE AND I SEND THAT IN TO YOU UNDER THE LAW. IT IDENTIFIES WHAT STATUTORY AGGRAVATING CIRCUMSTANCE THAT YOU MAY FOLLOW AND IT ALSO IDENTIFIES WHAT STATUTORY MITIGATING CIRCUMSTANCES THAT YOU MAY CONSIDER AND IT ALSO HAS THE LAST SENTENCE WHICH IS IN CAPS, YOU MAY ALSO CONSIDER ANY NON-STATUTORY MITIGATING CIRCUMSTANCES. THAT ONE SENTENCE SIMPLY MEANS THAT I EMPHASIZE TO YOU THAT I HAVE ALREADY COVERED MITIGATING CIRCUMSTANCES OF ANY NATURE MUST BE CONSIDERED. I SEND THAT INTO [sic] YOU. I HAVE SIGNED THAT. THAT'S A MATTER THAT I SEND IN UNDER THE LAW. YOU JUST [Tr. 2095] SIMPLY RECEIVE THAT FORM BECAUSE THE COURT HAS SIGNED THAT FORM. YOU MAY REFER TO THAT FORM FOR YOUR CONSIDERATION OF MATTERS IN THIS CASE.

NOW, THEN I HAVE A SHEET, MR. FOREMAN AND MEMBERS OF THE JURY. WE ALWAYS HAVE THE NAME OF THE CASE. WE CALL IT THE CAPTION IN THE LAW. IT SIMPLY IDENTIFIES THE STATE OF SOUTH CAROLINA VERSUS JONATHAN SIMMONS, DEFENDANT. NOW, ON THIS FORM, ON THE SIDE FROM THE CAPTION, IT READS: FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCES, IT READS: WE, THE JURY, IN THE ABOVE-ENTITLED CASE FIND, BEYOND A REASONABLE DOUBT, THE EXISTENCE OF

THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCES AND THEN THERE ARE SOME BLANK LINES, A PLACE FOR THE FOREMAN TO SIGN AND A PLACE TO DATE IT. YOU NEED TO DEAL WITH THIS FORM FIRST. UNLESS YOU FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND EVERY REASONABLE DOUBT, YOU CANNOT GO ANY FURTHER. PLEASE DEAL WITH THIS FORM FIRST.

NOW, THE STATUTORY AGGRAVATING CIRCUMSTANCE THAT IS PRESENTED BY THE STATE IS BURGLARY IN THE FIRST DEGREE. DEAL WITH THIS FORM FIRST. THERE MUST BE A UNANIMOUS FINDING THAT THERE IS THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE, BEYOND EVERY REASONABLE DOUBT, AT THE TIME THE MURDER WAS COMMITTED. PLEASE DEAL WITH THAT FORM FIRST. THAT SHOULD BE YOUR FOCUS, INITIALLY, IN REGARD TO THIS MATTER. WAS THERE PROOF OF A STATUTORY [Tr. 2096] AGGRAVATING CIRCUMSTANCE, BEYOND EVERY REASONABLE DOUBT?

THEN YOU HAVE OTHER FORMS. THE FORM THAT I NOW HOLD IN MY RIGHT HAND IS A TWO-PAGE FORM, MR. FOREMAN AND MEMBERS OF THE JURY. IT'S TWO PAGES. IT HAS THE CAPTION OF THE CASE. THEN ON THE SIDE IT HAS FROM THE CAPTION, SENTENCE OF DEATH PENALTY. IT READS: WE, THE JURY, IN THE ABOVE ENTITLED CASE HAVING FOUND, BEYOND A REASONABLE DOUBT, THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE AND IF YOU FIND AN AGGRAVATING CIRCUMSTANCE, YOU MUST

WRITE IT IN HERE NOW. YOU MUST WRITE IT IN HERE IN ORDER TO GO FURTHER ON THIS FORM. NOW SENTENCE THE DEFENDANT, JONATHAN SIMMONS, TO DEATH. THEN THERE ARE TWELVE LINES. THE FIRST LINE IS IDENTIFIED AS THE FOREPERSON. THEN OTHER ELEVEN LINES ARE IDENTIFIED AS JUROR. ALL TWELVE JURORS MUST SIGN THIS FORM. ALL TWELVE JURORS MUST SIGN THIS FORM. YOU WILL THEN DATE IT, MR. FOREMAN, IF THIS IS USED BY THE JURY.

THE NEXT FORM HAS THE CAPTION OF THE CASE, THEN ON THE SIDE OF THE CAPTION IT SAYS SENTENCE OF LIFE IMPRISONMENT WITH FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCES. IT READS IN THE BODY: WE, THE JURY, IN THE ABOVE-ENTITLED CASE HAVING FOUND, BEYOND A REASONABLE DOUBT, THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE AND THEN IT'S A BLANK TO WRITE IT IN, NOW SENTENCE THE DEFENDANT, JONATHAN SIMMONS, TO LIFE [Tr. 2097] IMPRISONMENT. ONLY ONE LINE IS ON THIS FORM, MR. FOREMAN. YOU CAN SIGN THIS FORM ON BEHALF OF THE JURY PROVIDED IT IS UNANIMOUS. YOU CAN SIGN THIS FORM ON BEHALF OF THE JURY PROVIDED IT IS UNANIMOUS.

AND THEN THE FINAL FORM HAS THE CAPTION OF THE CASE. ACROSS FROM THE CAPTION IT SAYS SENTENCE OF LIFE IMPRISONMENT AND IT HAS ONLY ONE SENTENCE: WE, THE JURY, IN THE ABOVE-ENTITLED CASE SENTENCE THE DEFENDANT, JONATHAN SIMMONS, TO LIFE IMPRISONMENT. A PLACE FOR THE FOREPERSON TO SIGN IT, A

PLACE TO DATE IT. THE DIFFERENCE BETWEEN THIS LAST FORM AND THE FORM PRECEDING THAT, I EXPLAINED TO YOU, IS THAT THE LAST FORM IS A LIFE SENTENCE WITHOUT A FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCE. THE PRECEDING FORM WAS A LIFE SENTENCE WITH A FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCE.

NOW, MR. FOREMAN, MEMBERS OF THE JURY, IF YOU HAVE THE SLIGHTEST PROBLEM WITH THE FORMS, PLEASE, LET ME KNOW. I WILL SEND THE FORMS IN IN ORDER, MR. FOREMAN. I BELIEVE, THEY ARE SELF-EXPLANATORY, BUT IF YOU HAVE THE SLIGHTEST PROBLEM, I'M HERE TO HELP. I'M HERE TO HELP.

* * *

[Tr. 2105] (WHEREUPON, THE JURY BEGAN THEIR DELIBERATIONS AT 11:45 A.M.)

(RECESS.)

THE BAILIFF: COURT COME TO ORDER. ALL RISE, PLEASE. ALL RISE.

THE COURT: THANK YOU. PLEASE BE SEATED EVERYONE. I HAVE A BILLET-DOUX FROM THE JURY. IT IS "JUNE 30, 1991. JUDGE ANDERSON, DOES THE IMPOSITION OF A LIFE SENTENCE CARRY WITH IT THE POSSIBILITY OF PAROLE? JAMES E. WRIGHT, JURY FOREPERSON".

RIGHTS ARE RESERVED; RIGHTS ARE PROTECTED. THE COURT WILL NOW ENGAGE IN A CHARGE TO THE JURY. THIS NOTE IS MADE A PART OF THE RECORD IN THE CASE.

COURT'S 19.

(WHEREUPON, COURT'S NUMBER 19, JURY NOTE, MARKED FOR THE RECORD AT THIS TIME.)

BRING THE JURY OUT. NO WHISPERING OR TALKING NOW. LET'S COME TO ORDER, FOLK.

(WHEREUPON, THE JURY RETURNED TO THE COURTROOM WITH A QUESTION AT 1:15 P.M.)

THE BAILIFF: JURORS ALL PRESENT, YOUR HONOR.

[Tr. 2106] THE COURT: THANK YOU, MR. BAILIFF. MR. FOREMAN, I RECEIVED THE NOTE AND I RESPOND AS FOLLOWS: MR. FOREMAN AND MEMBERS OF THE JURY, PLEASE, PLEASE, GIVE ME YOUR ATTENTION. YOU ARE INSTRUCTED NOT TO CONSIDER PAROLE OR PAROLE ELIGIBILITY IN REACHING YOUR VERDICT. DO NOT CONSIDER PAROLE OR PAROLE ELIGIBILITY. THAT IS NOT A PROPER ISSUE FOR YOUR CONSIDERATION. THE TERMS LIFE IMPRISONMENT AND DEATH SENTENCE ARE TO BE UNDERSTOOD IN THEIR PLAN [sic] AND ORDINARY MEANING. THE TERMS LIFE IMPRISONMENT AND DEATH SENTENCE ARE TO BE UNDERSTOOD IN THEIR PLAIN AND ORDINARY MEANING.

THANK YOU VERY MUCH. PLEASE GO BACK TO YOUR JURY ROOM.

(WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT 1:18 P.M.)

THE COURT: YES.

THE SOLICITOR: NO ADDITIONS OR EXCEPTIONS, YOUR HONOR.

THE COURT: DEFENSE?

MR. QUINN: YOUR HONOR, I EXCEPT ON ALL THE GROUNDS WE'VE PREVIOUSLY STATED. WE JUST RENEW THAT OBJECTION.

THE COURT: LET THE RECORD SHOW THAT THE PREVIOUS GROUNDS PRESENTED BY THE DEFENDANT HAVE BEEN CONSIDERED AND THOSE GROUNDS ARE NOW PRESENTED BACK TO THE COURT WITH [Tr. 2107] SPECIFICITY. THE SAME GROUNDS ARE CONSIDERED; THE SAME RULING IS MADE. RIGHTS ARE RESERVED; RIGHTS ARE PROTECTED IN REGARD TO APPELLATE REVIEW. THANK YOU VERY MUCH, COUNSEL.

(RECESS.)

THE BAILIFF: COURT COME TO ORDER. ALL RISE. THE HONORABLE RALPH KING ANDERSON, JR., PRESIDING. ALL RISE.

THE COURT: THANK YOU. PLEASE BE SEATED.

LADIES AND GENTLEMEN, GIVE ME YOUR ATTENTION. NOW, WE HAVE BEEN NOTIFIED THAT THE JURY HAS REACHED A VERDICT. THIS VERDICT WILL BE TAKEN BY THE COURT. THE DUTY AND RESPONSIBILITY IMPOSED UPON THESE JURORS IS AWESOME. THIS GARGANTUAN TASK HAS NOW BEEN COMPLETED BY THEM. DO NOT REACT TO THE JURY VERDICT. PLEASE, DO NOT REACT TO THE

JURY VERDICT. IF YOU REACT TO THE JURY VERDICT, I AM GOING TO TAKE ACTION.

IF I HAD SOME STENTORIAN VOICE WHERE I COULD COMMUNICATE WITH MORE VIM AND VIGOR, I WOULD, BUT THE CONCLUSION IS SIMPLY THIS, DO NOT REACT.

NOW, LAWYERS FOR THE STATE, DO YOU NEED TO TAKE ANY FURTHER ACTION IN REGARD TO PARTIES YOU REPRESENT?

THE SOLICITOR: YOUR HONOR, WE HAVE RELATED TO EVERYONE IN THE COURT NOT TO EXHIBIT FACIALLY, HAND MOVEMENTS, SEAT MOVEMENTS. I BELIEVE THEY ARE CLEAR. I [Tr. 2108] THINK DEFENSE COUNSEL HAS DONE THE SAME THING –

THE COURT: THANK YOU, MR. SOLICITOR –

THE SOLICITOR: – WITH THEIR FOLKS –

MRS. SHEALY: WE HAVE, YOUR HONOR.

THE COURT: MRS. JENNIFER KNEECE SHEALY?

MRS. SHEALY: WE HAVE INSTRUCTED OUR FAMILY MEMBERS AS WELL.

THE COURT: ALL RIGHT. BRING THE JURY OUT.

(WHEREUPON THE JURY RETURNED TO THE COURTROOM WITH A VERDICT AT 1:43 P.M.)

THE BAILIFF: THE JURORS ALL PRESENT, YOUR HONOR.

THE COURT: THANK YOU, MR. BAILIFF. MS. CLERK, YOU ARE RECOGNIZED.

THE CLERK: MR. FOREMAN, HAVE YOU REACHED YOUR VERDICT?

THE FOREMAN: WE HAVE.

THE CLERK: HAND IT TO ME, PLEASE?

(WHEREUPON, THE VERDICT FROM IS HANDED TO THE CLERK AT THIS TIME.)

THE COURT: ALL RIGHT. INDICTMENT NUMBER 90-GS-40-5861, THE STATE VERSUS JONATHAN SIMMONS, FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCES: WE, THE JURY, IN THE ABOVE-ENTITLED CASE FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES: TO WIT, BURGLARY FIRST [Tr. 2109] AGREED [sic]. SIGNED JAMES E. WRIGHT, AS FOREMAN. JUNE 30, 1991.

INDICTMENT NUMBER 90-GS-40-5861, THE STATE VERSUS JONATHAN SIMMONS, WE, THE JURY, IN THE ABOVE-ENTITLED CASE HAVING FOUND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES: TO WIT, BURGLARY FIRST DEGREE, WE SENTENCE THE DEFENDANT, JONATHAN SIMMONS, TO DEATH. SIGNED JAMES E. WRIGHT AS FOREPERSON; CHARLES EZELL, JILL COOPER, TOLLIE ELDERS, CHARLES YELTON, STEPHEN SMITH, ALFREDIA CASH, CARTER JORDON, JACQUELYN MATTHEWS,

WILLIE GRIDINE, JUDY WICKER, AND ROBERT DOLE.
JUNE 30, 1991.

* * *

[Tr. 2322] COURT'S EXHIBIT 10

[Tr. 2323] **STATE OF SOUTH CAROLINA**)
) AFFIDAVIT
COUNTY OF RICHLAND)

Appeared before me Robert W. Oldendick, who being duly sworn deposes and says:

I am the Director of the Survey Research Laboratory of the University of South Carolina's Institute for Public Affairs, and have held that position since August, 1989. I hold a Ph.D. degree in political ccience [sic] from the University of Cincinnati, and have twenty years' experience in the area of public opinion survey research methodology.

Between June 17 and June 22, 1991, I conducted the public opinion survey summarized on the eight-page document attached hereto. I hereby attest to the truth of all matters set forth therein.

/s/ Robert W. Oldendick
ROBERT W. OLDENDICK

[Jurat omitted in printing]

[Tr. 2324] **SURVEY METHODOLOGY**

The respondents interviewed in this study represent a random sample of individuals age 18 and older, living in households with telephones in South Carolina. The

sample for this study was drawn by means of random-digit dialing (RDD). RDD is telephone interviewing coupled with the use of telephone numbers generated completely at random. In drawing this sample all the operating exchanges (area code plus three-digit prefixes) in the State of South Carolina were identified. From this list, one of the exchange numbers was randomly drawn and a second random number between 0000 and 9999 generated to complete the telephone number. This process was repeated until a sufficient quantity of telephone numbers had been created to provide 500 completed interviews. Within households, a respondent 18 years of age or older was randomly chosen to be interviewed by means of the last birthday method of respondent selection. In order that the sample would represent the potential juror pool, respondents were first asked whether they were either registered to vote in South Carolina or had a valid South Carolina driver's license; if a person did not meet either of these criteria, they were not interviewed.

The data collection was carried out by the professional interviewing staff of the Survey Research Laboratory of the University of South Carolina's Institute of Public Affairs. Prior to the actual interviewing, the interviewers and interviewing supervisors received specialized training for this survey. The interviewing was conducted from the Institute's offices on the University of South Carolina Columbia campus. Each interviewer was monitored to ensure that the questionnaire instructions were being followed. Interviews were conducted between June 17 and June 22, 1991. Calls were made from 9:00 AM to 9:30 PM Monday through Friday, and from 10:00 AM to 4:00 PM on Saturday.

In order to avoid biasing the sample in favor of those individuals that were most easily contacted, repeated attempts were made to contact those numbers that were [Tr. 2325] consistently not answered. Calls were made at different times of the day and on different days of the week in order to contact those individuals who may be away from home on a regular basis. In addition, households in which an interview was initially refused were recontacted, and an attempt made to gain cooperation.

A total of 504 completed interviews were conducted for this study. The response rate was 76.6%. In 95 out of 100 cases, the potential sampling error (error due to the fact that not all residents of the State were interviewed) is ± 4.4%.

The following tables provide the results of this survey. Tables 1 - 3 present the data for those people whose opinion concerning the death penalty depended upon the circumstances of the case; that is, they neither favored nor opposed the death penalty in all cases where a person is convicted of murder. Tables 4 - 6 provide this same information for all respondents.

[Tr. 2326] TABLE 1

POSSIBILITY OF RELEASE IF SENTENCED TO LIFE IMPRISONMENT

Question: "When a person is convicted for murder in South Carolina, they must be sentenced to life imprisonment or to the death penalty. If a person is sentenced to life imprisonment does this mean that they will have to spend the rest of their life in prison or can they be released from prison at some point in the future?"

Response	N	%
Will Have To Serve The Rest Of Their Life	82	20.0
Can Be Released At Some Point	293	71.6
Don't Know	34	8.3

[Tr. 2327] TABLE 2

AMOUNT OF TIME SPENT IN PRISON IF SENTENCED TO LIFE IMPRISONMENT

Question: "If you heard today that someone was sentenced by a court in South Carolina to life imprisonment for committing a murder, about how much time do you think they would have to spend in prison?"

Years	N	%
One	2	0.5
Two	3	0.7
Four	3	0.7
Five	3	0.7
Six	3	0.7
Seven	10	2.4
Eight	15	3.7
Nine	4	1.0
Ten	25	6.1
Eleven	8	2.0
Twelve	15	3.7
Thirteen	2	0.5
Fourteen	1	0.2
Fifteen	27	6.6
Eighteen	8	2.0

Twenty	58	14.2
Twenty-two	2	0.5
Twenty-five	15	3.7
Twenty-eight	3	0.7
Thirty	20	4.9
Thirty-two	1	0.2
Thirty-five	1	0.2
Thirty-eight	1	0.2
Forty	6	1.5
Forty-four	1	0.2
Forty-five	1	0.2
Fifty	2	0.5
Sixty	2	0.5
Eighty	1	0.2
Rest Of Their Life	29	7.1
Don't Know	137	33.5

(IF DON'T KNOW, PROBE: "Do you think it would be less than ten years, between ten and nineteen years, twenty to twenty-nine years, or thirty years, or more?"

Categories (All Responses)	N	%
Less Than Ten Years	64	15.6
Ten To Nineteen Years	131	32.0
Twenty To Twenty-Nine Years	101	24.7
Thirty Years Or More	61	14.9
Don't Know	23	5.6
Rest Of Their Life	29	7.1

[Tr. 2328] TABLE 3

IMPORTANCE OF KNOWING TIME BEFORE CHANCE OF RELEASE

Question: "As you may know, in South Carolina the jury normally decides whether to sentence a convicted murderer to life imprisonment or to the death penalty. If you were on a jury and had to make that decision, how important would it be for you to know how much time the person would have to spend in prison before they would have a chance to be released, if you sentenced them to life imprisonment . . . extremely important, very important, somewhat important, not too important, or not at all important?"

Response	N	%
Extremely Important	176	43.0
Very Important	137	33.5
Somewhat Important	42	10.3
Not Too Important	10	2.4
Not At All Important	18	4.4
Don't Know	26	6.4

[Tr. 2329] TABLE 4

POSSIBILITY OF RELEASE IF SENTENCED TO LIFE IMPRISONMENT

Question: "When a person is convicted for murder in South Carolina, they must be sentenced to life imprisonment or to the death penalty. If a person is sentenced to life imprisonment does this mean that they will have to spend the rest of their life in prison or can they be released from prison at some point in the future?"

Response	N	%
Will Have To Serve The Rest Of Their Life	102	20.2
Can Be Released At Some Point	358	71.0
Don't Know	44	8.7

[Tr. 2330] TABLE 5

AMOUNT OF TIME SPENT IN PRISON IF SENTENCED TO LIFE IMPRISONMENT

Question: "If you heard today that someone was sentenced by a court in South Carolina to life imprisonment for committing a murder, about how much time do you think they would have to spend in prison?"

Years	N	%
One	2	0.4
Two	3	0.6
Four	4	0.8
Five	3	0.6
Six	4	0.8

Seven	12	2.4
Eight	19	3.8
Nine	4	0.8
Ten	33	6.5
Eleven	10	2.0
Twelve	20	4.0
Thirteen	2	0.4
Fourteen	1	0.2
Fifteen	34	6.7
Eighteen	9	1.8
Twenty	70	13.9
Twenty-two	2	0.4
Twenty-five	18	3.6
Twenty-eight	3	0.6
Thirty	24	4.8
Thirty-two	1	0.2
Thirty-five	1	0.2
Thirty-eight	2	0.4
Forty	6	1.2
Forty-four	1	0.2
Forty-five	1	0.2
Fifty	2	0.4
Fifty-five	1	0.2
Sixty	3	0.6
Eighty	1	0.2
Rest Of Their Life	38	7.5
Don't Know	170	33.7

(IF DON'T KNOW, PROBE: "Do you think it would be less than ten years, between ten and nineteen years, twenty to twenty-nine years, or thirty years, or more?"

Categories (All Responses)	N	%
Less Than Ten Years	80	15.9

Ten To Nineteen Years	161	31.9
Twenty To Twenty-Nine Years	121	24.0
Thirty Years Or More	77	15.3
Don't Know	27	5.4
Rest Of Their Life	38	7.5

[Tr. 2331] TABLE 6

IMPORTANCE OF KNOWING TIME BEFORE CHANCE OF RELEASE

Question: "As you may know, in South Carolina the jury normally decides whether to sentence a convicted murderer to life imprisonment or to the death penalty. If you were on a jury and had to make that decision, how important would it be for you to know how much time the person would have to spend in prison before they would have a chance to be released, if you sentenced them to life imprisonment . . . extremely important, very important, somewhat important, not too important, or not at all important?"

Response	N	%
Extremely Important	231	45.8
Very Important	159	31.5
Somewhat Important	47	9.3

Not Too Important	12	2.4
Not At All Important	23	4.6
Don't Know	32	6.3

IN THE COURT OF GENERAL SESSIONS

[Tr. 2332] [Caption omitted in printing]

REQUEST TO CHARGE NO. 3
REQUESTED INSTRUCTION ON EFFECT OF JURY'S SENTENCING

The Defendant requests that the Court instruct the jury as follows:

I.

You will notice that I have used the word "recommendation" in referring to your decision on the question of what punishment the Defendant should receive. I have used this word because that is the word used in the statute itself. But it is important to understand that your decision as to sentence is really more than a "recommendation" as you or I might use that word in everyday speech. I tell you this because the law provides that whatever your "recommendation" is, I as the trial judge must accept it, and must sentence the Defendant accordingly. See *State v. Tyner*, 258 S.E.2d 559, *State v. Gilbert*, 258 S.E.2d 712 (1979).

II.

You should also understand that these sentences mean what they say. That is, if you recommend that the Defendant be sentenced to death, he actually will be put to death by electrocution. And if you recommend that the Defendant be sentenced to life imprisonment, [Tr. 2333] he actually will be sentenced to imprisonment in the State Penitentiary for the balance of his natural life, will not be

eligible for parole and will not "max out" his sentence. In short, he will spend the rest of his natural life in jail.

* * *

[Tr. 2334] COURT'S EXHIBIT # 17

DEFENDANT'S REQUEST TO CHARGE NO. A

Jury's Duty to Disregard Speculation
About alleged Deterrent

Effect of Death Sentence

The defendant, Jonathan Dale Simmons, respectfully requests that the Court instruct the jury as follows:

In deciding whether to impose a sentence of life imprisonment or death upon the defendant, Jonathan Dale Simmons, you are not to speculate on which, if either, of these sentences is more likely to deter other persons from committing similar crimes in the future.

There is no evidence before you as to whether the death penalty will deter crimes like the one in this case any more effectively than will life imprisonment. Therefore, you should disregard anything you may have heard one way or the other on this subject, and should set aside any preconceived opinions which you may hold as to whether life imprisonment or the death penalty is the more effective deterrent to murder. Such questions cannot be resolved in a trial such as this one. Therefore, they should play no role in your deliberations, and should not even be mentioned by you in the jury room. I instruct you that your sentencing decision must be based only on the evidence that has been presented in this case, pertaining

to the particular circumstances of this crime and the character and background of this defendant.

AUTHORITY:

State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), *cert denied,* 463 U.S. 1229 91983) (evidence concerning deterrent effect of death penalty inadmissible in capital sentencing or resentencing proceeding).

* * *

[Tr. 2339] DEFENDANT'S REQUEST TO CHARGE NO G

I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to death, he actually will be sentenced to death and executed. If, on the other hand, you recommend that he be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life.

In your deliberations, you are not to speculate that these sentences mean anything other than what I have just told you, for what I have just told you is exactly what will happen to the defendant, depending on what your sentencing decision is.

S.C. Code Sec. 16-3-20
Caldwell v. Mississippi
State v. Atkins

* * *

[Tr. 2344] [COURT'S EXHIBIT 19] JUNE 30, 1991

JUDGE ANDERSON,

DOES THE IMPOSITION OF A LIFE SENTENCE CARRY WITH IT THE POSSIBILITY OF PAROLE?

S/ JAMES E. WRIGHT
JURY FOREPERSON

* * *

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jonathan Dale Simmons, Appellant.

Appeal From Richland County
Ralph King Anderson, Jr., Judge

Opinion No. 23784
Heard October 13, 1992 - Filed February 1, 1993

AFFIRMED

MOORE, A.J.: Appellant was convicted of murder, first degree burglary, and petit larceny. He was sentenced to death, a consecutive life term, and thirty days. We affirm.

FACTS

On July 17, 1990, the victim, Josie Lamb, was found dead in the bathroom of her home in the Olympia area of Columbia. Her skull had been crushed by an assailant who used the toilet tank lid to beat her on the head. Ms. Lamb was seventy-nine years old.

Appellant's fingerprint was found on the commode lid and his bloody footprint on the floor. He was arrested the next day and confessed to killing Ms. Lamb. He stated he went to her house "to see a white male named Jimmy,

redheaded, he owed me 50 dollars." He had been to Ms. Lamb's house and asked for Jimmy the previous week but when he touched the door handle Ms. Lamb screamed and he fled. On the night of the murder, he entered the home and heard her scream. After looking around to be sure no one else was present, appellant went into the bathroom and struck Ms. Lamb twice on the head with the commode lid. At some point he unplugged the telephone. He took a nightgown from a bedroom and fled.

At the guilt phase of trial, counsel conceded that appellant had in fact murdered Ms. Lamb and had taken the nightgown. Appellant's defense focused on the State's failure to prove first degree burglary which was the only statutory aggravating circumstance alleged in this case. He contended there was no evidence he intended to commit a crime at the time he entered Ms. Lamb's house since, as stated in his confession, he had gone there intending only to look for "Jimmy."

In response to appellant's trial strategy, the State was allowed to introduce under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), evidence of appellant's confessions to other crimes against three elderly female victims.

ISSUES

1. Whether the *Lyle* evidence was properly admitted?

2. Whether appellant was entitled to a penalty phase charge regarding his parole ineligibility?

3. Whether a charge regarding general deterrence should have been given?

4. Whether a charge describing each asserted nonstatutory mitigating circumstance should have been given?

DISCUSSION

GUILT PHASE

S.C. Code Ann. §16-11-311(A) (Supp. 1991) requires the State to prove as one element of first degree burglary that the defendant "entered a dwelling without consent and with intent to commit a crime therein." While such an intent is inferable from the defendant's conduct in the absence of other proof, *State v. Haney*, 257 S.C. 89, 184 S.E.2d 344 (1971), here the issue of intent was joined by evidence appellant had no intent to commit a crime when he entered Ms. Lamb's house. To prove intent, the Solicitor introduced the following three confessions given by appellant shortly after his arrest for Ms. Lamb's murder:

1. *Faris Mims*
   Ms. Mims is an elderly woman who lived in the Olympia area of Columbia at the time she was assaulted. In May 1990, appellant approached the front door of Ms. Mims house and asked for directions. He then went to her back door and forced his way in. He sexually assaulted her while choking her with some clothing around her neck. He stole $50 from the house. He admitted he chose the victim because he saw she was an "old lady."

2. *Marie Furtick*
   Ms. Furtick was seventy-one years old at the time she was assaulted by appellant in her home in the South Congaree area. In August 1989, appellant went to Ms. Furtick's front door and threw water on her when she opened the door. He then raped her, beat her and stole money.

3. *Estelle Simmons*
   Ms. Simmons is appellant's grandmother. She was seventy-one years old and lived near Ms. Furtick when, in June 1990, appellant raped and beat her in her home. He unplugged her telephone and looked for money.

The State introduced other evidence that both Ms. Furtick and Ms. Simmons were very severely beaten about the head and face. Ms. Furtick was bitten on the breast and buttocks. Although appellant's confessions indicate he took money from both Ms. Furtick and Ms. Simmons, the State's evidence indicates nothing of value was taken from either home.

Appellant argues that this evidence of other crimes should have been excluded because (1) these crimes were too dissimilar to the Lamb murder to be probative and (2) the prejudicial impact of this evidence was too great.

We find this evidence was properly admitted under *State v. Lyle* as evidence tending to establish intent. Clear and convincing evidence of other crimes that is logically relevant to prove intent is admissible under *State v. Lyle* if its probative value outweighs its undue prejudicial effect. *See State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990).

Although appellant asserts these other crimes are "too dissimilar" to be admitted under *State v. Lyle*, we find the evidence of other crimes is logically relevant to the issue of intent.

Evidence is relevant if it tends to make more or less probable some matter in issue upon which it directly or indirectly bears. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991); *State v. Bell, supra*. The evidence of appellant's violence against elderly women, each of whom was alone in her home at the time of the attack, makes more probable appellant's criminal intent when he entered Ms. Lamb's house since he already knew her to be an elderly woman. Although there was no sexual assault in Ms. Lamb's case, all of the previous sexual assaults were accompanied by terrific physical violence far beyond that need to accomplish the sexual assault itself. Moreover, theft was not the overwhelming motivation in these prior cases. It is logical to conclude from the evidence that appellant was chiefly motivated in each case by an intent to violently injure an elderly woman. This evidence is therefore relevant to the issue of appellant's intent at the time he entered Ms. Lamb's home without her consent.

Further, we find the probative value of this evidence outweighs its undue prejudicial effect. The issue of intent was a contested one. *Cf. State v. Garner*, 304 S.C. 220, 403 S.E.2d 631 (1991) (prejudicial effect of evidence of other crimes outweighs its probative value when purpose for which it is admitted is not a contested issue). The fact that appellant's grandmother was one of several elderly women he violently injured is probative because it demonstrates that even her status as his grandmother did not

negate his particular violent intent regarding elderly women.

We hold the evidence of other crimes was properly admitted under *State v. Lyle* as evidence tending to establish intent on the burglary charge in this case.

SENTENCING PHASE

At the sentencing phase of trial, appellant requested a charge that if sentenced to life imprisonment, he would be ineligible for parole under S.C. Code Ann. §24-21-640 (Supp. 1991).[1]

The trial judge ruled that *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), precluded any charge on parole eligibility or ineligibility. After the general sentencing charge was given, the jury posed a question to the judge: "Does the imposition of a life sentence carry with it the possibility of parole?" The trial judge then gave the "plain meaning" charge required under *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985), that the jury was not to consider "parole or parole eligibility" and the terms "life" and "death" are to be understood in their plain and ordinary meaning.

Appellant contends the trial judge erred in refusing his requested charge because *Torrence* did not settle this

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[1] Section 24-21-640 provides:
The Board [of Probation, Parole and Pardon] must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in §16-1-60.

issue and failure to give the charge violates his due process and eighth amendment rights.

In *Torrence*, the defendant requested a charge that he would be ineligible for parole under §24-21-640 since he was already serving a life sentence for a previous murder. The trial judge denied the request but offered to charge that under S.C. Code Ann. §16-3-20 (Supp. 1991) the defendant would be eligible for parole only after twenty or thirty years depending upon whether an aggravating circumstance was found. This is the charge approved in *State v. Atkins*, 293 S.C. 294, 360 S.E.2d 302 (1987).

Justice Finney, writing for the majority, reversed Torrence's death sentence because "the trial judge committed prejudicial error in denying [his] request to charge based upon §24-21-640." 305 S.C. at 54. Justice Chandler concurred in result noting that the *Atkins* charge given under §16-3-20 was inaccurate in Torrence's case. He then overruled *Atkins* for a majority of the Court because (1) parole is not a proper consideration for a sentencing jury since it is not a mitigating circumstance and (2) practical problems may arise in the application of the parole statutes. Further, Justice Chandler's analysis relies on the proposition that the issue is solely a matter of state law under *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed. 2d 1171 (1983).

We need not engage in an academic discussion whether *Torrence* applies to both parole eligibility and ineligibility since we conclude the *Norris* charge given in this case satisfies in substance appellant's request for a charge on parole ineligibility.

In *State v. Davis*, ___ S.C. ___, 411 S.E.2d 220 (1991), we clarified that despite our ruling in *Torrence*, a defendant is still entitled, upon request, to a plain meaning charge under *State v. Atkins, supra*. Although the trial judge erroneously declined to give a plain meaning charge upon request in this case, the error was cured when he properly followed *State v. Norris, supra*, in answering the jury's question regarding the possibility of parole as follows:

> You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean. *State v. Bell*, 305 S.C. 11, 406 S.E.2d 165 (1991); *State v. Patterson*, 299 S.C. 280, 384 S.E.2d 699 (1989). We conclude a reasonable juror would have understood from the charge given that life imprisonment indeed meant life without parole. We therefore find appellant's argument without merit.

Appellant further contends the trial judge erroneously denied his requested charge that the jury should disregard any alleged deterrent effect on others in deciding whether to impose life or death. The Solicitor, however, declined to argue general deterrence to the jury and specifically stated "all we are here to do is to deter [appellant]." Thus, general deterrence was never an issue presented to the jury. Moreover, we have previously held

the refusal to give such a charge is not error. *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984).

Finally, appellant argues the trial judge erred in denying his request that a detailed list of twenty-seven nonstatutory mitigating circumstances be submitted to the jury. Appellant concedes this procedure is not required so long as the jury is instructed, as it was here, to consider "any nonstatutory mitigating circumstances." *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981).

PROPORTIONALITY REVIEW

We have conducted the sentence review required by S.C. Code Ann. §16-3-25 (1985) and conclude the evidence supports the jury's finding of an aggravating circumstance. We find the death sentence was not arbitrarily imposed and is proportionate to the penalty in similar cases.

AFFIRMED.

HARWELL, C.J., TOAL, A.J., and Acting Associate Justice Bruce Littlejohn, concur. FINNEY, A.J., dissenting in separate opinion.

FINNEY, A.J. (Dissenting): I respectfully dissent. In my view, appellant was deprived of a fair trial by virtue of the erroneous admission of appellant's past crimes under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Further, I dissent from the majority's holding that appellant was not entitled to a jury charge to the effect that he would be ineligible for parole if sentenced to life in prison. I would reverse appellant's conviction and remand for a new trial.

Admission of Evidence Under State v. Lyle

At trial, the State introduced appellant's confessions to three past crimes involving the assault of elderly women for the purpose of showing that he entered the victims [sic] dwelling with the intent to commit a crime therein. In doing so, the State sought to satisfy the intent requirement of first degree burglary, S.C. Code Ann. § 16-11-311(A) (Supp. 1991). In my view, these past crimes do not meet the test of admissibility under *Lyle, supra,* inasmuch as they are factually dissimilar from the present case, or too remote in time, and in at least one instance, unduly prejudicial.

In order for evidence of other crimes to be admissible under the settled exceptions, the evidence must have "logical relevance to the particular excepted purpose for which it is sought to be introduced". *Lyle* at 807. Due to the very nature of such evidence and "the dangerous tendency and misleading probative force", its admission should be subject to rigid scrutiny by the courts. Should the court not clearly perceive logical relevance between the extraneous crime and the offense charged, the defendant should be given the benefit of the doubt and the evidence rejected. *Id. See also State v. Douglas*, 397 S.E.2d 98 (1990).

One prior incident on which evidence was admitted occurred more than one year prior to the offense for which appellant was on trial. I find this offense too remote in time to reasonably establish that because appellant entered this prior victim's dwelling with intent to commit a crime, he did so in the present case, or that there was a common scheme or plan. *Lyle* at 808.

Even if the evidence of past crimes is deemed relevant, it may nonetheless be excluded if the danger of unfair prejudice outweighs its probative value. *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987).

The state was permitted to introduce evidence of appellant's assault of his grandmother. I would hold that the prejudicial effect of this most egregious evidence was substantially outweighed by any probative value which may have been deduced therefrom. *Johnson, supra.*

Jury Charge On Parole Eligibility

Appellant contends the Circuit Court erred in declining to charge the jury that in the event he was sentenced to life in prison, he would be ineligible for parole under S.C. Code Ann. § 24-21-640. I agree.

Consistent with my opinion in *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), I believe that appellant was entitled to a jury charge under § 24-21-640 since he "sought only to have the court declare correct and current law relevant to his case". *Id.* at 320.

March 10, 1993

David I. Bruck, Esquire
P. O. Box 11744
Columbia, S. C. 29211

M. Anne Pearce
Assistant Appellate Defender
South Carolina Office of
Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201

Re: The State v. Jonathan Dale Simmons
Dear Ms. Pearce and Mr. Bruck:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing
denied.

s/David W. Harwell C.J.
s/Jean H. Toal A.J.
"I would grant. s/James E. Moore A.J.

s/Ernest A. Finney, Jr. A.J.
Associate Justice Chandler,
not participating

March 10, 1993."

* * *

SUPREME COURT OF THE UNITED STATES

No. 92-9059

Jonathan Dale Simmons,

Petitioner

v.

South Carolina

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of South Carolina.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that petition for writ of certiorari be, and the same is hereby, granted. The brief of the petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 5, 1994. Rule 29 does not apply.

October 4, 1993